Supreme Court, U.S.
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No. 06-1050

In the Supreme Court of the United States

LISA BURKE, MICHAEL CARPER, Individually and on Behalf of All Others Similarly Situated,
Petitioners,

v.

UTAH TRANSIT AUTHORITY, JOHN INGLISH, Individually, LOCAL 382 OF THE AMALGAMATED TRANSIT UNION and the UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions for the Court are created by the peculiar handling of a labor law case potentially impacting many thousands of public transit workers. This is explained in detail in the following "Statement and History of the Case" section.

The questions presented are as follows:

1. Is it consistent with due process, fundamental fairness, the right to a jury trial and Federal Rule of Civil Procedure 56 for the District Court to grant summary judgment, by use of a legal test or standard solely created by that Court, which ignored the decades-old test for evaluating an appropriate bargaining unit in labor law?

2. Can a court grant a dismissal pursuant to Rule 12(b)(6) by creating a standard that required the petitioners to foresee the future and object to the Department of Labor's certification of protective arrangements, based on a labor dispute that occurred several years after the DOL certified them pursuant to the Urban Mass Transportation Act, and not on petitioners' stated claim that the protective arrangements were inadequate because they did not provide a mechanism to resolve a labor dispute involving bargaining unit clarification?

3. Does the District Court's expanded application of *Perry Education v. Perry Local Educator Assn.* 460 U.S. 37 (1983) to the facts of this case create a circuit split and is it contrary to this Court's affirmation of the Fifth Circuit in *Garland Independent School Dist. v. Texas State Teachers Assn.*, 479 U.S. 801 (1986)?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED 2

STATEMENT AND HISTORY OF THE CASE 3

A. History 3

B. Statement of the Case 7

REASONS FOR GRANTING THE PETITION 9

I. THE RULING BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS ON THE PROTECTIONS GUARANTEED BY UMTA, FEDERAL LABOR POLICY AND THE FREE SPEECH RIGHTS OF STATE EMPLOYEES 9

A. The Ruling on Summary Judgment Below Conflicts With the Ruling of Another Circuit Deciding the Protections Under UMTA 9

B. The Lower Courts' Decisions Conflict with the Fifth Circuit, the NLRB and the Rationale of this Court's Precedent 11

C. By Expanding the Scope of *Perry Education v. Perry Local Educator Assn.* in a Manner Rejected by the Fifth Circuit, the Tenth Circuit Opinion Is Contrary to that Circuit. (The Fifth Circuit was Summarily Affirmed by the United States Supreme Court on *Perry*.) 12

D. The Scope of UMTA is an Important Federal Question 14

II. THE COURT OF APPEALS ERRED BY UPHOLDING THE GRANTING OF SUMMARY JUDGMENT TO UTA AND A MOTION TO DISMISS TO THE DOL 15

CONCLUSION 22

APPENDIX

Appendix A: 11/6/06 Circuit Court Order 1a

Appendix B: 9/1/06 Circuit Court Opinion 3a

Appendix C: 8/15/05 district Court Order Granting Defendants' Motion for Summary Judgment 24a

Appendix D: 4/7/05 District Court Order Granting U.S. Department of Labor's Motion to Dismiss . . 38a

Appendix E: 4/5/05 District Court Motion for a Final Order 40a

Appendix F: 3/9/05 District Court Minutes/Docket Entry 42a

Appendix G: 1/25/05 District Court Order Denying Plaintiffs' Motion for a Preliminary Injunction . . . 44a

Appendix H: 9/15/06 Petition for En Banc Review 54a

TABLE OF AUTHORITIES

Page(s)

Cases

Amalgamated Transit Union Intl. v. Donovan,
767 F.2d 939 (D.C. Cir. 1985) 10, 14, 16

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 17

Baltimore Sun Company v. NLRB,
257 F.3d 419 (4th Cir. 2001) 11, 18

Borden v. NLRB, 19 F.3d 502 (10th Cir. 1994) 20

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) . . 16, 18

Chas S. Winner, Inc. v. Teamsters Local Union No. 115,
777 F.2d 861 (3rd Cir. 1985) 11

Clue v. Johnson, 179 F.3d 57 (2nd Cir. 1998) 13

Commc'n Workers of America v. Ector County Hospital,
2004 U.S. App. LEXIS 24768
(5th Cir. Dec. 1, 2004) 13

Connick v. Myers, 461 U.S. 138 (1983) 5, 13

Enfield v. A.B. Chance Co.,
228 F.3d 1245 (10th Cir. 2000) 19

Fairbanks v. Alaskan Dept. of Labor,
763 P.2d 976 (Alaska 1988) 14

Garland Independent School Dist. v. Texas State Teachers Assn.,
479 U.S. 801 (1986) 13

Gitano Group, Inc., 308 NLRB 1172 (1992) 19, 20

Hammontree v. NLRB,
925 F.2d 1486 (D.C. Cir. 1991) 12

Moran v. Burbine, 475 U.S. 412 (1986) 15

Nat'l Treasury Employees Union v. Chertoff,
452 F.3d 839 (D.C. Cir. 2006) 10

Nelson v. Adams, USA, Inc., 529 U.S. 460 (2000) 15

NLRB v. Magnavox Co., 415 U.S. 322 (1974) 12, 14

NLRB v. Paper Manufacturers,
786 F.2d 163 (3rd Cir. 1986) 11

Park City Ed. Assn. v. Bd. Ed. Park City School Dist.,
879 P.2d 267 (Utah Ct. App. 1994) 19

Perry Education v. Perry Local Educator Assn.,
460 U.S. 37 (1983) 12, 13

Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.,
777 F.2d 1046 (5th Cir. 1985) 13

Statutes

28 U.S.C. § 1254 (1) 2

28 U.S.C. § 2101 (c) 2

29 U.S.C. § 151 *et. seq.* [National Labor Relations Act] 5

29 U.S.C. § 157 [Section 7 of the NLRA] 12

49 U.S.C. § 5333 (b) [Section 13 (c) of the Urban Mass Transportation Act] 20, 21

Rules

Fed. R. Civ. P. 12 (b) (6) 8, 16

Fed. R. Civ. P. 56 (c) 3

Fed. R. Civ. P. 56 (f) 5, 6, 8

Other Authorities

U.S. CONST. amend. I . . . . . *passim*

U.S. CONST. amend. V 2, 16

U.S. CONST. amend. VII . . . . . *passim*

PETITION FOR A WRIT OF CERTIORARI

Petitioners Burke and Carper respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit in *Burke, et al v. Utah Transit Authority, et al*; Nos. 05-4079 and 05-4222 (November 6, 2006), denying Appellant's Petition for Panel Rehearing, is set forth in the Appendix hereto (App., *infra*, 1a-2a).

The published decision of the United States Court of Appeals for the Tenth Circuit in *Burke, et al v. Utah Transit Authority, et al,* 462 F.3d 1253 (10th Cir. 2006), affirming the District Court's decision granting summary judgment in favor of the respondents, is set forth in the Appendix hereto (App., *infra*, 3a-23a).

The unpublished memorandum decision of the District Court of August 15, 2005, in *Burke, et al v. Utah Transit Authority, et al*; No. 2:04-cv-00985, granting UTA's motion for summary judgment, is set forth in the Appendix hereto (App., *infra*, 24a-37a).

The unpublished order of the District Court of April 07, 2005, in *Burke, et al v. Utah Transit Authority, et al*; No. 2:04-cv-00985, granting respondent DOL's motion to dismiss, is set forth in the Appendix hereto (App., *infra*, 38a-39a).

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit denying petitioners' Petition for En Banc Rehearing was entered on November 6, 2006. This petition for writ of certiorari by petitioners is filed within ninety (90) days of that date. 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V

> No person shall . . . be deprived of life, liberty, or property without due process of law. . .

United States Constitution, Amendment VII

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any

court of the United States, than according to the rules of the common law.

Federal Rules of Civil Procedure 56(c)

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT AND HISTORY OF THE CASE

A. History

Blue collar workers have been dealt a travesty of justice by the federal courts. One employee, an immigrant, has compared the U.S. judicial system unfavorably to that of his native Columbia. The history of this case buttresses this assertion and justice requires this Court to exercise its supervisory responsibility. On October 22, 2004, the petitioners, representing the light rail ("TRAX") employees of the Utah Transit Authority ("UTA"), filed a class action complaint alleging, among other things, that UTA was denying them their right to free speech, free association and was in violation of Utah state law by denying them the right to choose their own bargaining representative and by denying them similar access to a bulletin board afforded Amalgamated

Transit Union Local 382 ("Local 382"), a union endorsed by UTA but lacking majority support of the TRAX employees. The petitioners, after requesting mediation but being rebuffed by UTA, filed for a preliminary injunction requesting immediate access to a bulletin board and other relief. After the injunction was filed, petitioners were given access to a bulletin board by UTA but none of the other relief was granted. Because the case involved labor issues, petitioners requested an evidentiary hearing on their injunction to conform with federal law that required such a hearing prior to an injunction being granted. Affidavits were filed with the District Court supporting the injunction and petitioners subpoenaed two hostile witnesses. After the filing of the two subpoenas with the District Court, counsel was contacted by the court and informed that an evidentiary hearing would not be held.

Approximately one half hour before the January 24, 2005 hearing, counsel for the petitioners was supplied with a tentative decision denying the injunction on the stated grounds that the petitioners were unlikely to prevail on the merits. Counsel noticed that the District Court had evaluated the merits on the "severance" doctrine and not the "accretion" doctrine. This totally changed the burden of evidence in the case and required that the petitioners demonstrate that a combined bus and rail unit was not an appropriate bargaining unit, instead of correctly requiring that UTA demonstrate that the TRAX unit could not be an appropriate bargaining unit. Four days later, the District Court issued its final decision that was virtually identical to the tentative decision but with a cursory albeit incorrect analysis of accretion. (App., *infra*,44a-53a). Petitioners, realizing that the District Court had committed plain error, asked, in a filing to the District Court, for a reconsideration of the severance vs. accretion issue, and provided the District Court with new persuasive

authority. In light of the fact that an evidentiary hearing would probably be denied, the filing requested a new injunction which asked for new and minimal relief that could be supported without an evidentiary hearing. Thus, the new filing cannot be considered merely a request for reconsideration and should be considered a separate request for an injunction.

The District Court, in an unsigned minute entry, denied the request for the new injunction without explanation or a hearing. (App., *infra*, 42a-43a). Petitioners filed a motion requesting that a signed order be issued but were forced to file with the Tenth Circuit Court without the District Court ever issuing such an order. (App., *infra*, 40a-41a). Respondents UTA and John Inglish then filed for summary judgment. Petitioners opposed the summary judgment on the basis that there was a genuine dispute of material facts, that there had been no discovery and the petitioners had timely filed a 56(f) affidavit detailing the need for discovery and finally explaining to the District Court that it was applying the wrong legal standard to evaluate the proper community of interest for a bargaining unit. Before the May 20, 2005, hearing on the summary judgment motion, the District Court gave the parties its tentative order granting summary judgment. Petitioners noticed that the order did not address the status of defendant Local 382 despite the District Court only having ancillary jurisdiction over that defendant. During oral argument, petitioners suggested that if the District Court was going to dismiss the other defendants it should dismiss Local 382 for lack of jurisdiction. Besides the grounds identified above for not granting the summary judgment, petitioners argued that the District Court was ignoring the individual rights of the TRAX employees that the National Labor Relations Act ("NLRA") protects and that Section 13(c) of the Urban Mass Transportation Act ("UMTA") similarly protects these rights.

The District Court accepted the argument made by Local 382 that the NLRA does not protect individual rights but expressed concern after listening to petitioners' oral argument that its decision might not be sustained and asked Local 382 if it could develop a failure to exhaust argument that would give the District Court independent grounds to grant summary judgment and gave the parties a briefing schedule.

Petitioners timely filed a brief demonstrating that there were no administrative remedies to exhaust and provided the District Court with an en banc decision by the District of Columbia Circuit Court of Appeals demonstrating that individual rights are protected by the NLRA and argued that the District Court needed additional oral argument since this legal right went to the heart of petitioners' claims. Approximately three months after the hearing and two months after supplemental briefing was filed, the petitioners filed a motion to amend due to changed circumstances since the filing of the original complaint. The District Court, immediately after this motion filing, without addressing the motion or amending its tentative order to address the individual rights issue or the final defendant issue, granted the summary judgment motion and closed the entire case. Petitioners filed a timely notice of appeal from the District Court's August 15, 2005, memorandum order.

On appeal, the Tenth Circuit addressed the merits of the District Court's memorandum order granting summary judgment, but the Court did not address or acknowledge in any way the unique procedural posture of the case or the propriety of the District Court creating a substantive standard without giving the petitioners notice of the standard and an opportunity to oppose that standard by identifying material facts in dispute. Additionally, the changed standard denied petitioners the ability to request, under Rule 56(f), more

discovery. The petitioners had filed their opposition using the only standard explicitly identified by any of the parties. Instead of addressing the relevant substantive standard, the Tenth Circuit merely set out the relevant summary judgment standards and held that the District Court did not err in its determination that the bargaining unit was appropriate under the unspecified standard used by the District Court. The Tenth Circuit also ignored the First Amendment issues despite being fully briefed by the petitioners.

Petitioners filed a timely petition for an en banc rehearing, specifically taking issue with the panel's erroneous statement that they had not presented any evidence that the TRAX employees objected to the present bargaining representative and that the question of majority status of the bargaining unit was not material. (App., *infra*, 54a-68a). The petitioners also objected to the panel's failure to address the First Amendment issues and the incorrect characterization of why the petitioners objected to the U.S. Department of Labor ("DOL"), the third defendant. The Tenth Circuit denied the Petition for En Banc Rehearing on November 6, 2006, without providing reasons. (App., *infra*, 1a-2a).

Petitioners have now brought to this Court this petition seeking a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

B. Statement of the Case

Petitioners opposed summary judgment using the established standard for the creation of an appropriate bargaining unit created by federal law and accepted for decades by both the National Labor Relations Board ("NLRB") and most state labor commissions. The State of Utah, in order to be eligible for federal funds under UMTA,

had passed a statute which purported to give workers involved in its transit district, UTA, equivalent rights to those possessed by private workers under the NLRA. Utah does not presently have a labor commission that addresses labor issues. The employees of the new light-rail operation, TRAX, learned this after first attempting to obtain a bargaining unit clarification before the Utah Labor Commission. After learning that the commission is now misnamed since it only addresses employment law issues, they sought relief from the DOL pursuant to UMTA, which requires that to be eligible for federal funds, a state transit district must protect the bargaining rights of its workers. These are known as protective arrangements. The DOL refused to help the TRAX employees and stated that the issue of unit clarification must be addressed by the state. The employees then brought suit against both UTA and the DOL, asserting that UMTA required that the workers must have the ability to protect the most basic bargaining right, the right to pick their bargaining representative in an appropriate bargaining unit. The District Court dismissed the DOL pursuant to 12(b)(6). Moreover, the District Court granted summary judgment to UTA despite the petitioners identifying numerous factual disputes under the established standard for evaluating an appropriate bargaining unit and timely requesting discovery in a Rule 56(f) motion. The petitioners were never given any opportunity for discovery. The District Court asserted that UTA and an existing bus union, Local 382, had the right to choose the bargaining representative for the TRAX employees despite numerous precedents, including United States Supreme Court precedent, holding to the contrary. While the Tenth Circuit did not address this argument for granting summary judgment, it did implicitly uphold the granting of summary judgment under a legal standard which was never identified to the petitioners and is contrary to the established standards for evaluating an

appropriate bargaining unit. Thus, both courts have denied petitioners due process and their right for a jury to act as the fact finder.

Consequently, more than two years after first trying to protect their bargaining rights under UMTA and their First Amendment free association and free speech rights, the employees are still being denied a bargaining representative of their own choosing. The lower courts have given them no recourse against what is essentially a company union. The courts have granted summary judgment despite the clear factual disputes. The courts have also denied the petitioners their requested jury trial, in violation of the Seventh Amendment of the United States Constitution, by deciding the ultimate factual question of whether the bargaining unit was appropriate.

REASONS FOR GRANTING THE PETITION

I. THE RULING BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS ON THE PROTECTIONS GUARANTEED BY UMTA, FEDERAL LABOR POLICY AND THE FREE SPEECH RIGHTS OF STATE EMPLOYEES.

A. The Ruling on Summary Judgment Below Conflicts With the Ruling of Another Circuit Deciding the Protections Under UMTA.

Determining UMTA Rights. The District Court decision affirmed by the Tenth Circuit Court ignored the need to measure the petitioners' bargaining rights under UMTA by a federal standard and not a state standard. This places the Tenth Circuit decision in conflict with the D.C. Circuit. The D.C. Circuit stated this about UMTA:

> The legislative history, therefore, reveals Congress' clear intent to measure state labor laws against the standards of collective bargaining established by federal labor policy. The Secretary's contrary construction of section 13(c) would produce a meaningless tautology: if state law defines the "collective bargaining rights" that must be continued under the federal statute, then a public transit authority's labor relations always will be in compliance with section 13(c), because by definition a state transit authority will be in conformity with state law. Congress clearly did not envision section 13(c)(2) operating in such a fashion.

Amalgamated Transit Union, International v. Donovan, 767 F.2d 939, 948 (D.C. Cir. 1985).

The decision by the Tenth Circuit panel creates such a tautology by interpreting Utah law, passed to be in compliance with UMTA, as not protecting the most basic bargaining right of employees; the right to select a bargaining representative in an appropriate bargaining unit despite the fact that the Utah law was passed to make UTA eligible for federal funds. In that sense it is in conflict with the D.C. Circuit even if the precise issue was not addressed by them. Moreover, recently the D.C. Circuit has addressed what it means to protect bargaining rights under a comparative statute. The law, similar to UMTA, requires that bargaining rights be protected. The D.C. Circuit held that the lower court should examine how the term has been defined under federal labor law. *Nat'l Treasury Employees Union v. Chertoff*, 452 F.3d 839, 857-58 (D.C. Cir. 2006). This approach to protecting bargaining rights necessarily requires that an "appropriate bargaining unit" be subject to the established twelve factor test so that bargaining rights will be

protected. This test can be found in *Baltimore Sun Company v. NLRB,* 257 F.3d 419, 429 (4th Cir. 2001).

For some inexplicable reason, the Tenth Circuit panel found that a federal judge who had no definition under Utah state law of "appropriate bargaining unit," should ignore 70-plus years of federal labor law cases and doctrines defining appropriate bargaining units and just decide on a basis of his own creation.

B. The Lower Courts' Decisions Conflict with the Fifth Circuit, the NLRB and the Rationale of this Court's Precedent.

The Tenth Circuit affirmed a decision by the District Court that allowed a representation issue to be decided by contract. That is clearly contrary to NLRB case law, other circuits and the guidance of this Court. As stated by the Third Circuit Court of Appeals; "Representation issues may not be decided by contract, and thus may not be decided by an arbitrator." *NLRB v. Paper Manufacturers*, 786 F.2d 163, 167 (3rd Cir. 1986) (quoting *Chas S. Winner, Inc. v. Teamsters Local Union No. 115*, 777 F.2d 861 (3rd Cir. 1985). That court went on to state: "Like successorship, **accretion** is a representative issue. **It cannot be resolved by a contract** between Local 169 and the employer and thus cannot be resolved by the contractual remedy of arbitration." *Id.* (Emphasis added). Additionally, this is contrary to United States Supreme Court precedent. The United States Supreme Court allows a union to waive economic rights but not bargaining rights. The Supreme Court stated that:

> [A] different rule should obtain where the rights of the employees to exercise their choice of a bargaining representative is involved--whether to have no

> bargaining representative, or to retain the present one, or to obtain a new one. When the right to such a choice is at issue, it is difficult to assume that the incumbent union has no self-interest of its own to serve by perpetuating itself as the bargaining representative.

NLRB v. Magnavox Co., 415 U.S. 322, 325 (1974) (Citation omitted.)

The dissent in *Magnavox,* including Justice Rehnquist, explained that a union's ability to waive Section 7 rights does not include the right to waive rights where the union and employees have conflicting interests. 415 U.S. at 327. Counsel for the TRAX employees thought that this case clearly established that the TRAX employees have individual rights concerning choosing a bargaining representative that could not be waived by any contract between UTA and Local 382. Similarly, an en banc decision from the D.C. Circuit recognizes that a union cannot waive individual rights and that *Magnavox* and its progeny clearly stand for the proposition that the NLRA protects individual rights. *Hammontree v. NLRB,* 925 F.2d 1486, 1490 (D.C. Cir. 1991) (en banc).

C. By Expanding the Scope of *Perry Education v. Perry Local Educator Assn.* in a Manner Rejected by the Fifth Circuit, the Tenth Circuit Opinion Is Contrary to that Circuit. (The Fifth Circuit was Summarily Affirmed by the United States Supreme Court on *Perry*.)

The District Court held that the First Amendment claims by the petitioners were precluded by *Perry,* 460 U.S. 37 (1983). (App., *infra*, 33a-35a). However, the petitioners informed the District Court that *Perry* only held that a rival

labor organization could not demand equal access to school grounds. The petitioners distinguished the case by pointing out that they were employees of UTA, not a rival union, and thus could not be held to the *Perry* standard. This is consistent with *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 777 F.2d 1046, 1053-54 (5th Cir. 1985). Moreover, the United States Supreme Court summarily upheld this analysis in *Garland Independent School Dist. v. Texas State Teachers Assn.*, 479 U.S. 801 (1986). Thus, the District Court and the Tenth Circuit, which silently affirmed this standard, are in conflict with the Fifth Circuit and have ignored this Court's precedent.

This decision has resulted in the dissident employees being denied their right to free speech. The respondents argued that union organization efforts are not of public concern in the Tenth Circuit. The District Court did not directly address the issue and neither did the Tenth Circuit. However, their decisions seem to affirm this argument. Other courts that have addressed the issue directly have found concerted union activity is public concern speech. In fact, the Second Circuit Court found that the right of dissident union members to speak is of public concern and entitled to First Amendment protection. *Clue v. Johnson*, 179 F.3d 57, 61 (2nd Cir. 1998). As stated by that court: "We believe that activities on behalf of a union faction that necessarily entail a substantive criticism of management raise matters of public concern under *Connick*." *Id.* (*referring to Connick v. Myers*, 461 U.S. 138 (1983)). One of the most recent cases involving free speech and union organizing was from the Fifth Circuit. In that case, the Fifth Circuit Court held that union activity was of public concern because it concerned the employment terms of all potential union members and the change in conditions for them could affect the general public. *Commc'n Workers of America v. Ector County Hospital*, 2004 U.S. App. LEXIS

24768, at *16 (5th Cir. Dec. 1, 2004). Union related speech was equated with political speech.

Certainly, since the issue of seniority is connected with allegations that the present system is being run in an unsafe manner, it is a matter of public concern. Freedom of association is certainly an important right connected to petitioners' efforts to force UTA to recognize the TRAX employees right to an appropriate bargaining unit under state and federal law. See *NLRB v. Magnavox Co.*, 415 U.S. 322, 326 (1974); *Fairbanks v. Alaskan Dept. of Labor*, 763 P.2d 976, 977 (Alaska 1988).

Thus, for the reasons identified above, the petitioners clearly had a basis for a section 1983 action and that claim should not have been dismissed by summary judgment by the District Court nor affirmed by the Tenth Circuit. (App., *infra*, 33a-35a)

D. The Scope of UMTA is an Important Federal Question.

Defining the scope of UMTA impacts many thousands of transit employees throughout the United States. Prior to the Tenth Circuit decision, *Donovan* attempted to define this scope. *Amalgamated Transit Union, International v. Donovan*, 767 F.2d 939, 947-51 (D.C. Cir. 1985). The approaches of the cases are markedly different and the Tenth Circuit decision would effectively strip transit workers of all ability to engage in unit clarification or representative elections in states without labor commissions.

The workers in the TRAX division, a much smaller unit than the multiple bus divisions at UTA, have no effective representation. Membership in Local 382 reflects the

overwhelming majority of bus employees whose interests are opposite those of TRAX employees. This is demonstrated in serious safety issues that are not addressed by the union since it would impede the ability of bus employees to move over to the TRAX division. Further, it allows UTA to keep wages low for TRAX employees whose additional railroad skills are not compensated because the bus employees do not want rail employees paid more. Both UTA and Local 382 have a vested interest in maintaining the present arrangement. This same situation is repeated throughout the country.

II. THE COURT OF APPEALS ERRED BY AFFIRMING THE GRANTING OF SUMMARY JUDGMENT TO UTA AND A MOTION TO DISMISS TO THE DOL.

The Due Process Clause of the Constitution prohibits deprivations of life, liberty, or property without "fundamental fairness" which means a prohibition against governmental conduct that offends the community's sense of justice, decency and fair play. *Moran v. Burbine*, 475 U.S. 412, 432-34 (1986). The District Court's actions in this case offend a sense of justice, decency and fair play. The District Court failed to adhere to the Federal Rules of Civil Procedure, by granting summary judgment when there were disputed facts. The Federal Rules of Civil Procedure were designed to protect due process. *Nelson v. Adams, USA, Inc.* 529 U.S. 460, 465 (2000). Moreover, without notice to petitioners, the District Court created a legal standard without a legal basis in federal or state law. The District Court took this action after the non-moving party had filed its opposition to summary judgment and requested discovery under the only identified standard. The District Court never gave the non-movants the opportunity to amend their opposition and in fact, never explicitly identify the new standard. This all occurred with

the non-movants never being given an opportunity for any discovery, thus violating *Celotex Corp. v. Catrett,* 477 U.S. 317, 326 (1986) requirements that they be given an adequate opportunity for discovery. The failure of the District Court to provide guidance on the new legal standard made identifying material facts under a new unknown standard impossible. The District Court created a new standard that found no material facts in dispute after petitioners filed their opposition under the appropriate standard.[1] These actions have prevented the non-movants a jury trial on issues involving the First Amendment and without providing notice to the parties or an opportunity to respond. Thus, the values embodied in the 1st, 7th and 5th Amendments have been trampled, creating a result that is fundamentally unfair and in violation of petitioners' due process rights. Additionally, the District Court offended fundamental fairness by imposing on the petitioners, in addressing a separate motion to dismiss, the impossible and nonsensical requirement that in order to state a claim, they must assert that they objected to protective arrangements created by the DOL on the grounds of a labor dispute which arose years later. (App., *infra*, 38a-39a). Clearly, requiring the petitioners to foresee the future to avoid a dismissal pursuant to Rule 12(b)(6) violates fundamental fairness. The petitioners had challenged the certification of the protective arrangements due to their inadequacy. This type of claim has been clearly recognized. *Amalgamated Transit Union, International v. Donovan*, 767 F.2d 939, 945

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[1] The petitioners had identified material facts in dispute. While the Tenth Circuit stated that: "Summary judgment is appropriate where there are disputed issues of *material* fact," the petitioners have assumed that this is a clerical error. (App., *infra*, 19a) (emphasis in original).

(D.C. Cir. 1985). The District Court should not have altered the pleading requirements.

Rule 56 of the Federal Rules of Civil Procedure does not specify that a District Court must identify the legal standard that it will use in evaluating the sufficiency of a response in opposition to a motion for summary judgment. However, fundamental fairness would require that if a court was going to deviate from an established standard that it inform the non-movant of the new standard. As stated by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986): "As to materiality, the substantive law will identify which facts are material." *Id.* at 248. How can a plaintiff identify material facts in dispute without knowing the new standard? In the case at bar, neither the District Court nor the Tenth Circuit have ever identified the legal standard or test used to reach their conclusion that no material facts are in dispute. Clearly, this violates fundamental fairness and appears result oriented and not grounded in an attempt to satisfy due process.

The petitioners used a standard that they assumed would be used, based on the fact that only this standard might satisfy the UMTA requirement that bargaining rights be protected. This established test is the standard that should have been used and consists of:

> (1) similarity in the scale and manner of determining earnings; (2) similarity in employment benefits, hours of work, and other terms and conditions of employment; (3) similarity in the kind of work performed; (4) similarity in the qualifications, skills, and training of the employees; (5) frequency of contact or interchange among the employees; (6) geographic proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy;

> (9) relationship to the administrative organization of the employer; (10) history of collective bargaining; (11) desires of the affected workers; (12) extent of union organization.

Baltimore Sun Company v. NLRB, 257 F.3d 419, 429 (4th Cir. 2001).

In *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) the Court upheld the granting of summary judgment stating:

> The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

This case demonstrates that the Court's confidence may have been misplaced. Petitioners were denied all discovery despite requesting it. While they sought clarification of the legal standard to better resist summary judgment, they were never given the new standard.

This creation of a new standard occurred despite the Tenth Circuit panel admitting that UMTA led to a provision in Utah state law that required UTA to negotiate with an appropriate bargaining unit. The panel stated: "This provision was enacted in 1969 to comply with the requirements of federal law contained in UMTA and thereby ensure federal funding." (App., *infra*, 15a n.2). Clearly, it is more logical to find that a provision enacted pursuant to federal law is consistent with

the federal labor law that inspired it than to create out of whole cloth a standard that ignores federal doctrine without any state law supporting such a departure. In fact, had the panel followed Tenth Circuit precedent and tried to apply state law to an issue of first impression it would have applied the established federal doctrines. *See Enfield v. A.B. Chance Co.*, 228 F.3d 1245 (10th Cir. 2000). While this at first seems contradictory, Utah case law cited to the panel supports this view. Utah state law looks to federal law for guidance on state labor law issues. *Park City Ed. Assn. v. Bd. Ed. Park City School Dist.*, 879 P.2d 267, 272 (Utah Ct. App. 1994).

Thus, by ignoring the NLRB test for an appropriate bargaining unit the panel did not respect Utah law or federal law. Moreover, petitioners' due process rights have been violated by creating a legal standard after a party has to respond to a motion for summary judgment. Despite implicitly finding that the NLRB test for determining appropriate bargaining units did not apply, the panel then attempted to justify the District Court's finding that the case was governed by the NLRB's severance doctrine. (App., *infra*, 17a-19a). While both the District Court and the panel ignore that even the severance doctrine utilizes the 12-factor appropriate bargaining unit test, the petitioners had argued that the appropriate bargaining unit should be examined under the prism of the accretion doctrine. The panel denied them an evaluation under accretion by stating that the TRAX employees were too late to challenge accretion since they objected to their inclusion in the bargaining unit "nearly six years after the alleged accretion occurred." (App., *infra*, 17a).

This is factually and legally inaccurate. Under *Gitano Group, Inc.* 308 NLRB 1172 (1992), when the TRAX facility opened in December of 1999 (one year after the 1998

contract), geographically separate from the bus facility, a new bargaining unit was created. The TRAX employees were not accreted at that point so they had no need to object; they were as a matter of law in a separate bargaining unit. Moreover, under *Gitano,* since the majority of the employees were from the old facility, by presumption the bargaining representative was Local 382. Tenth Circuit case law does not find that two units represented by the same bargaining representative automatically create an accretion. *Borden v. NLRB*, 19 F.3d 502 (10th Cir. 1994). The TRAX employees were informed by Local 382 that their issues would be addressed when the five-year contract signed with UTA expired in 2003. It was only when it became clear that the new contract would not address their issues, including seniority, pay differentials and safety issues did the TRAX employees act. They informed UTA of the fact that they no longer desired to be represented by Local 382. They were told that UTA considered them one unit and not two despite *Gitano.*

The central issue, the protection afforded to transit workers to choose their bargaining unit and representative under UMTA was one of first impression, not only in the Tenth Circuit but in the entire United States. The issue is of exceptional importance because the decision can impact the rights of thousands of transit workers within the Tenth Circuit and will be cited precedent in the rest of the United States. The panel's view of Section 13(c) (2)(B) as codified at 49 U.S.C. § 5333(b) does not allow the TRAX employees to insist that either UTA respect their right to be in an appropriate bargaining unit as defined by federal standards or the DOL must cut off federal funds to the state agency. This is despite 49 U.S.C. § 5333(b) which states:

> (1) As a condition of financial assistance under sections 5307-5312, 5318(d), 5323(a)(1), (b), (d), and

> (e), 5328, 5337, and 5338(b) of this title **the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable**. The agreement granting the assistance under sections 5307-5312, 5318(d), 5323(a)(1), (b), (d), and (e), 5328, 5337, and 5338(b) shall specify the arrangements.
> (2) Arrangements under this subsection shall include the provisions that may be necessary for .....
> (B) **the continuation of collective bargaining rights;**
> .....

§ 13(c), 49 U.S.C. § 5333(b) (emphasis added).

The Tenth Circuit, by rejecting the UMTA based challenge to the Utah statute and dismissing the claim against the DOL for insufficient protective arrangements, has deprived petitioners of any mechanism to enforce the UMTA requirements. There is no mechanism in Utah law to allow changed representation, unit clarification and/or decertification, all of which are essential bargaining rights. The decision to dismiss the DOL combined with the District and Appellate Courts' holdings that no claim against UTA lies under UMTA, means that UMTA creates a right that cannot be enforced. (App., *infra*, 9a-11a). While the petitioners' do not disagree that UMTA does not create a direct cause of action against UTA, they believe that the Utah statute passed to comply with UMTA must guarantee the UMTA rights or the DOL certification based on the statute must be held to be unlawful. This is the theory of petitioners' case and a contrary holding makes a mockery of the protections created in UMTA.

The Tenth Circuit decision was based on a states' rights ideology and ignored established precedent. Due to the

scarcity of case law on UMTA, if allowed to stand as published authority it will deny workers the most basic protections afforded by UMTA.

CONCLUSION

This Court should grant a writ of certiorari to the petitioners. The petitioners have been deprived of due process by the lower courts. This Court should reiterate that lower courts should not misuse the summary judgment process to find ways to dismiss meritorious claims. This Court should also examine an important federal labor law statute to give uniform guidance to courts and, finally, it should bring uniformity to first amendment analysis of union organizing and communications in public organizations.

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January 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 05-4079, No. 05-4222

[Filed November 6, 2006]

LISA BURKE and MICHAEL CARPER, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

UTAH TRANSIT AUTHORITY and LOCAL 382, THE AMALGAMATED TRANSIT UNION,
Defendants-Appellees,

JOHN INGLISH, individually; THE UNITED STATES DEPARTMENT OF LABOR,
Defendants.

LISA BURKE and MICHAEL CARPER, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

UTAH TRANSIT AUTHORITY; JOHN INGLISH, individually; LOCAL 382 AMALGAMATED TRANSIT UNION, and THE UNITED STATES

DEPARTMENT OF LABOR,)
Defendants-Appellees.)
_____)

Before **TYMKOVICH**, Circuit Judge, **MCWILLIAMS**, Senior Circuit Judge, and **EAGAN**, District Judge.*

ORDER

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: /s/
Deputy Clerk

* The Honorable Claire V. Eagan, Chief District Court Judge, Northern District of Oklahoma.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 05-4079, No. 05-4222

[Filed September 1, 2006]

LISA BURKE and MICHAEL CARPER, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

UTAH TRANSIT AUTHORITY and LOCAL 382, THE AMALGAMATED TRANSIT UNION,
Defendants-Appellees,

JOHN INGLISH, individually, and THE UNITED STATES DEPARTMENT OF LABOR,
Defendants.

LISA BURKE and MICHAEL CARPER, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

UTAH TRANSIT AUTHORITY, JOHN INGLISH, individually, LOCAL 382 THE AMALGAMATED TRANSIT UNION, and THE UNITED STATES

DEPARTMENT OF LABOR,)
Defendants-Appellees.)
)

Appeal from the United States District Court
for the District of Utah
(D.C. No. 04-CV-985-PGC)

Daniel G. Moquin, Tuba City, Arizona (Mel S. Martin and Edward T. Wells, Murray, Utah, with him on the briefs) for Appellants.

Scott A. Hagen (James S. Jardine and Michael E. Blue with him on the briefs), Ray Quinney & Nebeker, P.C., Salt Lake City, Utah, for Appellees Utah Transit Authority and John Inglish; Joseph E. Hatch, Murray, Utah, for Appellee Local 382 of The Amalgamated Transit Union; Robert D. Kamenshine, Appellate Staff Attorney, (William Kanter, Appellate Staff Attorney, Robert G. McCampbell, United States Attorney, and Peter D. Keisler, Assistant Attorney General, with him on the brief), United States Department of Justice, Washington, D.C., for Appellee United States Department of Labor.

Before **TYMKOVICH**, Circuit Judge, **McWILLIAMS**, Senior Circuit Judge, and **EAGAN**, District Judge.*

OPINION

TYMKOVICH, Circuit Judge.

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* Honorable Claire V. Eagan, Chief District Court Judge, Northern District of Oklahoma.

Recognizing the need for more public transportation options in Utah's capital, the Utah Transit Authority (UTA) formulated a plan to add light rail service in Salt Lake City in the mid-1990s. Salt Lake City has long offered public transportation, beginning in 1904 with streetcar services and eventually changing exclusively to bus services. Since its inception, Local 382 of the Amalgamated Transit Union has continuously represented the employees of Utah's public transit system. Therefore, it was no surprise that when UTA established light rail service, Local 382 became the bargaining representative for those employees.

Despite Local 382's extensive history serving as the bargaining representative for Utah's public transit employees, a handful of light rail employees sought different representation. The question in this appeal is whether these employees are entitled under either federal law -- the Urban Mass Transportation Act of 1964 (UMTA), or state law -- the Public Transit District Act, to contest their inclusion in a bargaining unit with UTA's bus employees. The light rail employees claim that UTA's failure to afford them a separate bargaining representative violated the terms of both of these Acts.

The employees brought suit against UTA, Local 382, and the United States Department of Labor (DOL). The district court denied the employees' request for a preliminary injunction, granted summary judgment for UTA, and dismissed the suit against DOL. This appeal followed.

Having jurisdiction pursuant to 28 U.S.C. § 1291 and finding no error, we AFFIRM.

I. Background

UTA, a political subdivision of the state of Utah, provides public transportation services to Utah commuters. The bus system, operating throughout the state and comprising the vast majority of the services, has been in operation since the 1940s. In 1995, UTA decided to supplement this bus service by adding a light rail service in Salt Lake City. This service was dubbed TRAX.

At that time, UTA employees were covered by a collective bargaining agreement negotiated by Local 382, the bargaining representative for UTA and its predecessors since 1904. To ensure union representation for TRAX employees, UTA initiated negotiations with Local 382 to modify the collective bargaining agreement. These negotiations culminated in a new collective bargaining agreement that a majority of UTA employees ratified in 1999.

The new agreement maintained Local 382 as the bargaining representative for both bus and TRAX employees. It also established a seniority system for UTA employees who transferred to TRAX positions, thereby allowing a newly transferred but senior bus employee to bump a current TRAX employee to a less-desirable shift. Appellants Lisa Burke and Michael Carper transferred to TRAX as a result of this original agreement. In fact, the vast majority of TRAX's 150 employees are transferees from the 1000-member bus division.

This combined collective bargaining agreement remained in effect until 2003 when UTA and Local 382 entered into negotiations for a new agreement. During the course of these negotiations, appellants objected on the grounds that the proposed agreement maintained Local 382 as its exclusive

bargaining agent and continued the seniority program. UTA denied their petition and a majority of UTA employees ratified the new agreement, which included a provision establishing a task force to study the seniority issue.

The task force recommended no changes to the seniority system. Consequently, appellants complained to DOL that Local 382 could not adequately represent the interests of TRAX employees and, therefore, UTA was violating their collective bargaining rights. They asked DOL to investigate alleged violations of § 13(c) of UMTA, now codified at 49 U.S.C. § 5333(b), based on UTA's failure to afford TRAX employees a separate bargaining unit from the bus employees. DOL responded that the existing consolidated bargaining arrangement fully satisfied the requirements of § 13(c) and rejected their complaint.

Following DOL's rejection, appellants filed suit in the District of Utah against UTA, Local 382, and DOL. The action alleged UTA violated (1) UMTA, (2) Utah Code § 17A-2-1031, and (3) the First Amendment. It further claimed that Local 382 (4) breached its fiduciary duty to TRAX employees, and DOL (5) violated UMTA. As part of their lawsuit, appellants filed a motion for a preliminary injunction seeking to (1) bar UTA from transferring bus employees to TRAX, (2) bar UTA from allowing transferred employees to retain their seniority, and (3) require UTA to post information regarding their efforts to organize a new bargaining unit at the work site.

The district court denied the motion for a preliminary injunction. Appellants then filed a second motion for a preliminary injunction alleging the district court applied the wrong legal standards in its original denial. Again, their motion was denied. The district court subsequently granted

DOL's motion to dismiss, granted summary judgment in favor of UTA, and dismissed the action against Local 382. Appellants separately appealed the denial of the preliminary injunction orders as well as the dismissal of the claim against DOL and the grant of summary judgment. These appeals are consolidated before us.

II. Analysis

Appellants assert numerous errors on appeal, broadly arguing that UTA's failure to afford TRAX employees a separate bargaining unit with separate representation is a violation of UMTA and Utah Code § 17A-2-1031. Their primary argument is that the district court erred in granting summary judgment for UTA because it misapplied state and federal law. Additionally, they claim the court failed to properly assess DOL's duty under UMTA and failed to consider the entire administrative record before dismissing their action against DOL. Finally, appellants claim that the district court should not have denied either their motion for discovery or their motion to amend the complaint.[1]

A. Existence of Appropriate Bargaining Unit

Appellants' primary argument is that the district court erred in concluding that TRAX employees were not entitled to a separate bargaining representative under UMTA and Utah Code § 17A-2-1301. The district court, applying federal labor law precedents, concluded that the light rail employees

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[1] Appellants also appeal the district court's denial of their preliminary injunction motions. Because of our ultimate disposition in this case, this appeal is moot.

failed to show they should be separated from the existing bargaining unit.

We review a district court's grant of summary judgment de novo, applying the same legal standards used below. *Schutz v. Thorne*, 415 F.3d 1128, 1131 (10th Cir. 2005). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, we "view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Schutz*, 415 F.3d at 1131 (quotation omitted). At the summary judgment stage, a complainant cannot "rest on . . . 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' which for purposes of the summary judgment motion will be taken to be true." *Utah v. Babbitt*, 137 F.3d 1193, 1204-05 (10th Cir. 1998) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)).

1. UMTA

We begin by addressing whether appellants state a claim under UMTA. The district court noted that UMTA merely requires the preservation of collective bargaining rights for state transit employees. Finding that plaintiffs raised no factual issues in this regard, the court rejected the legal basis for their claim.

UMTA sets forth minimal standards that a state transit authority must satisfy before it may receive federal funding. Section 13(c) of the statute states:

> (1) As a condition of financial assistance . . ., the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable. . . .
>
> (2) Arrangements . . . shall include provisions that may be necessary for--
>
> > (A) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;
> >
> > (B) the continuation of collective bargaining rights;
> >
> > (C) the protection of individual employees against a worsening of their positions related to employment . . . .

49 U.S.C. § 5333(b).

Under its plain terms, the Act governs the financial relationship between the Department of Labor and state transit authorities. Section 13(c) provides "an important tool to protect the collective-bargaining rights of transit workers, by ensuring that state law preserve[s] their rights before federal aid [can] be used to convert private companies into public entities." *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 27-28, 102 S. Ct. 2202, 72 L. Ed. 2d 639 (1982). The Supreme Court also has noted that the "legislative history [of UMTA] indicates that Congress intended [collective bargaining agreements] to be governed by state law applied in state courts." *Id.* at 29; *see also Amalgamated Transit Union Int'l v. Donovan*, 247 U.S. App. D.C. 149, 767 F.2d 939, 947 (D.C. Cir. 1985)

("Section 13(c) does not prescribe mandatory labor standards for the states, but rather dictates the terms of federal mass transit assistance. States are free to forego such assistance and thus to adopt any collective bargaining scheme they desire.").

Accordingly, § 13 does not create a federal cause of action against state transit recipients. *Jackson Transit Auth.*, 457 U.S. at 29; *City of Beloit v. Local 643, AFSCME*, 248 F.3d 650, 653 (7th Cir. 2001). Appellants, therefore, do not state a claim under UMTA. Appellants' claim must arise, if at all, under state law.

2. Utah Code § 17A-2-1031

Appellants claim UTA violated the Utah Public Transit District Act, in particular § 17A-2-1031 of the Utah Code. This provision was enacted in 1969 to comply with the requirements of federal law contained in UMTA and thereby ensure federal funding. *See* Utah Code Ann. § 17A-2-1030 (requiring that "[t]he rights, benefits and other employee protective conditions and remedies of [§ 13(c) of UMTA] . . . apply to the establishment and operation by the district of any public transit service or system and to any lease, contract, or other arrangement to operate such system or services.").

The statute provides that a local transit authority shall recognize a labor organization that represents the majority of employees:

> Employees of any public transit system established and operated by the district shall have the right to self-organization, to form, join, or assist labor organizations and to bargain collectively through representatives of their own choosing provided, however, that such employees and labor organizations

> shall not have the right to join in any strike against such public transit system. *The district shall recognize and bargain exclusively with any labor organization representing a majority of its employees in an appropriate unit* with respect to wages, salaries, hours, working conditions, and welfare and pension and retirement provisions, and, upon reaching agreement with such labor organization, to enter into and execute a written contract incorporating therein the agreements so reached.

Id. § 17A-2-1031 (emphasis added).

Appellants argue that under § 17A-2-1031, a bargaining unit composed of both bus and TRAX employees is not an "appropriate unit," primarily because TRAX employees were denied their right to select a bargaining representative. This right, they assert, could neither be waived nor resolved by contract. Thus, they claim the district court erred in concluding that the existing unit could reasonably serve the interests of the light rail employees.

a. Appropriateness of Bargaining Unit

Section 17A-2-1031 requires UTA to "recognize and bargain exclusively with *any labor organization representing a majority of its employees in an appropriate unit* with respect to wages, salaries, hours, working conditions, and welfare and pension and retirement provisions." (emphasis added). Based on this plain language, UTA need only bargain with an appropriate unit, not the most appropriate unit. Because this provision was enacted to ensure federal funding under UMTA, we read appropriate to mean any unit sufficient to comply with UMTA.

The bargaining unit here -- composed of both TRAX and bus employees -- is appropriate. Preliminarily, UTA has continued to receive federal funding under § 13(c) and, as we later discuss, we find no error on the part of DOL in certifying the unit and granting aid. But even in the absence of DOL certification, we find the bargaining unit appropriate, for a number of reasons.

First, the collective bargaining history of UTA evidences the appropriateness of the consolidated unit. Local 382 has been the bargaining representative for every mass transit service in Utah since 1904, including all services provided by UTA. Local 382 has represented the consolidated unit since 1999.

Second, the current standard practice throughout the nation demonstrates that consolidation of bus and light rail employees is typically appropriate. The cities of Los Angeles, St. Louis, Baltimore, San Jose, Houston, Denver, Portland, and Sacramento have bargaining units composed of both bus and light rail employees. [Aple. Supp. App. at 7.] *See St. Louis Pub. Serv. Co.*, 77 N.L.R.B. 749 (1948) (finding appropriate a system-wide unit of bus and streetcar employees); *cf. Inter-Ocean Steamship Co.*, 107 N.L.R.B. 330, 332 (1953) (finding that a bargaining unit must be composed of all ships in an oceanic transport to be appropriate).

But, more importantly, nothing in the formation of UTA's current bargaining unit demonstrates an impairment to collective bargaining rights. The parties engaged in good faith negotiations on multiple occasions. *See Nat'l Treasury Employees Union v. Chertoff*, 452 F.3d 839, 863 (D.C. Cir. 2006) ("Then, as now, collective bargaining [is] universally understood to require, at a minimum, *good faith negotiations*

. . . ."); *Donovan*, 767 F.2d at 951 (noting that the "continuation of collective bargaining rights" as used in § 13(c) requires that employees, "at a minimum, . . . are entitled to be represented in meaningful, 'good faith' negotiations with their employer over wages, hours and other terms and conditions of employment."). The original bargaining agreement was created after extensive negotiations over the span of four years. Similarly, the most recent agreement involved extensive discussions, lasting nearly a year, which recognized the objections made by a subset of TRAX employees. Indeed, appellants' concern over seniority was taken into account and a task force to study the issue was created. Finally, both the original and subsequent bargaining agreements were ratified by a majority of UTA employees. *Cf.* 49 U.S.C. § 5333(b)(1) (requiring that the protective arrangements be "fair and equitable").

b. Federal Labor Law Doctrines -- Accretion and Severance

The district court reached the same conclusion applying federal labor law principles. In determining whether a bargaining unit is appropriate under federal law, courts have looked to two basic fact patterns. The first pattern, known as accretion, occurs when new employees or present employees in new jobs are absorbed, without an election, into an existing bargaining unit. The second, known as severance, occurs when a group of employees splits off from an existing bargaining unit because material changes in their job structure have made the existing unit inappropriate.

Appellants urged that accretion is the appropriate framework under which to analyze their situation; the court found the circumstances made the severance framework appropriate. Applying that framework, the court found no

violation of bargaining rights. We agree with the district court.[2]

An accretion "occurs when new employees, or present employees in new jobs, perceived to share a sufficient community of interest with existing unit employees, are added to an existing bargaining unit without being afforded an opportunity to vote in a union election." *NLRB v. Superior Prot., Inc.*, 401 F.3d 282, 287 (5th Cir. 2005); *see Frontier*

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[2] We doubt federal labor doctrine even applies here. The National Labor Relations Act (NLRA) does not govern this dispute because state law and a state agency are involved, and accretion as well as severance are merely procedural tools used by the National Labor Relations Board to judge whether a bargaining unit satisfies the standards set forth in NLRA. *See* 29 U.S.C. § 152(2); Utah Code Ann. § 34-20-2(5); *see also Jackson Transit Auth.*, 457 U.S. at 27-29 (noting that § 13(c) does not supercede state law and leaves intact the exclusion of local government employers from NLRA); *see generally* Robert A. Gorman & Matthew W. Finkin, *Labor Law* § 5.2 (2d ed. 2004). While Congress clearly intended "that federal labor policy would dictate the substantive meaning of collective bargaining for purposes of [UMTA]," *Donovan*, 767 F.2d at 950, it "did not intend to subject local government employers to the precise strictures of the NLRA." *Id.* at 949. To the contrary, Congress made a reasoned decision to incorporate only the most fundamental substantive tenets of federal labor policy.

Consequently, we are skeptical of analyzing the plain language of § 17A-2-1031 through this framework. Neither the plain language of the statute requires it, nor does the legislative intent behind the statute suggest it. Section 17A-2-1031 was enacted to meet the requirements of UMTA and to ensure the receipt of federal aid for Utah's public transportation system. If UMTA does not require analysis of these doctrines, then neither should § 17A-2-1031.

Tel. of Rochester, Inc., 344 N.L.R.B. No. 153, 2005 WL 1827781, at *2 (2005) (noting that "accreted employees are absorbed into an existing bargaining unit without an election or other demonstrated showing of majority status."). Typically in these circumstances, a smaller group of employees is cast against its will into a larger, preexisting group of employees. *Staten Island Univ. Hosp. v. NLRB*, 24 F.3d 450, 455 (2d Cir. 1994). This occurs most frequently when an employer acquires a new facility, and attempts to add the new employees at this facility, without an election, to a preexisting bargaining unit. *Superior Prot.*, 401 F.3d at 287 n.5; *see Nott Co., Equip. Div.*, 345 N.L.R.B. No. 23, 2005 WL 2115868, at *6 (2005) (noting that accretion principles are normally applied in circumstances in which groups of represented and unrepresented employees are consolidated).

Accretion is allowed *only* where the accreted employees have no true identity distinct from the existing unit and share an overwhelming community of interest with that unit. *Balt. Sun Co. v. NLRB*, 257 F.3d 419, 427 (4th Cir. 2001); *Frontier Tel.*, 344 N.L.R.B. No. 153, [WL] at *8 n.6. Because of concern that accreted employees do not have an opportunity to vote on their representation, the burden rests on the union to make this showing. *See NLRB v. Coca-Cola Bottling Co.*, 936 F.2d 122, 126 (2d Cir. 1991).

In contrast, a severance occurs when "changes in job structure are so significant that the existing bargaining unit, including the affected employees, is no longer appropriate." *NLRB v. Ill.-Am. Water Co.*, 933 F.2d 1368, 1375 (7th Cir. 1991). Severance is viewed as the converse of accretion: a group of employees either wishes to split off from the larger group in an existing bargaining unit or the employer claims that a group of employees should be excluded from a bargaining unit due to technological or organizational change.

See Robert A. Gorman & Matthew W. Finkin, *Labor Law* § 5.2(c) (2d ed. 2004). The burden rests on the party requesting severance to "show sufficient dissimilarity" to warrant the change to the bargaining unit. *Ill.-Am. Water*, 933 F.2d at 1375 (quotation omitted). Because severance is typically permitted only where the bargaining history in the larger unit is not notable or compelling, severance is rarely granted. N. Peter Lareau, *Labor and Employment Law* § 35.03[4] (2006); *see NLRB v. Catalytic Indus. Maint. Co.*, 964 F.2d 513, 519 (5th Cir. 1992) (noting that the NLRB is reluctant "to disrupt an established stable bargaining relationship.").

After reviewing the record, we are compelled to agree with the district court that severance best describes the situation here. First, appellants' objection to their inclusion in the bargaining unit arose nearly six years after the alleged accretion occurred. An accretion occurs, if at all, when the new position is created and the bargaining unit is extended to it. In contrast, severance occurs some time after the creation of the position, when it becomes clear that the bargaining unit is no longer appropriate due to changes in job structure. *Cf. Gibbs & Cox, Inc.*, 280 N.L.R.B. 953, 954 (1986) (refusing to assess a bargaining unit "from the vantage of any period of time but the one presently under consideration.").

Second, this case involves employees previously represented by the same bargaining unit. Accretion generally involves employees, whether new or transferred, that are added to an existing bargaining unit, not employees that are retained within the same bargaining unit.

Third, the circumstances here do not resemble a typical accretion claim. Accretion involves a group being cast against its will into another group. That is simply not the case with

the light rail employees – the original bargaining agreement was first ratified by the bus employees, who benefitted from the provision of the agreement allowing for transfer. And, the subsequent bargaining agreement was ratified by both bus and light rail employees. The instant facts, therefore, more closely resemble the typical severance case – a smaller group of employees, who previously approved of their inclusion with the existing bargaining unit, now requests to form a separate bargaining unit due to changed circumstances.

It is true that the doctrine of accretion has been applied where an employer staffs a new facility by transferring employees from an existing facility. However, even assuming the situation here can be characterized as a transfer to a new facility, there is a presumption of continued support of the union (and consequently that the employer is obligated to continue bargaining with the union) where the majority of employees in the new facility are transferees from the original bargaining unit. *Gitano Group*, 308 N.L.R.B. 1172, 1175 (1992); *see U.S. Tsubaki, Inc.*, 331 N.L.R.B. 327 (2000) (applying the *Gitano* presumption). Therefore, even were we to apply an accretion standard here, the burden rests on the appellants to overcome this presumption, and they have failed to do so.

The district court's conclusion is consistent with case law interpreting these doctrines. In applying severance principles, six non-exclusive factors are used to assess when severance from an existing bargaining unit should be permitted: (1) the homogeneity or distinctive character of the proposed unit; (2) the history of collective bargaining within the group; (3) the extent to which the proposed unit has maintained a separate identity during its period of inclusion in the larger group; (4) the history and pattern of collective bargaining in the industry; (5) the degree of integration between the groups;

and (6) the qualifications and experience of the bargaining representative. *Mallinckrodt Chem. Works*, 162 N.L.R.B. 387, 397 (1966). However, at all times the key consideration is the history of collective bargaining within the existing unit. *Catalytic Indus. Maint.*, 964 F.2d at 519.

These factors and the undisputed facts clearly support the district court's grant of summary judgment. The majority of TRAX employees, including the appellants, transferred from the bus unit. An "established stable bargaining relationship" has existed between Local 382 and the consolidated unit since 1999. Local 382 has been the bargaining representative for UTA and its predecessors and, consequently has represented all mass transit workers in Utah, since 1904. Finally, industry practice is to consolidate mass transit employees into a single bargaining unit.

Nonetheless, appellants argue that this issue should not be resolved on summary judgment since a determination of appropriateness is a necessarily fact-intensive inquiry. We disagree. Summary judgment is appropriate where there are disputed issues of *material* fact. As we have explained, the undisputed facts before us are more than ample to find the bargaining unit appropriate for purposes of Utah Code § 17A-2-1031 under any standard we apply.

* * * * *

In sum, we hold that appellants' claim against UTA fails under both UMTA and the Public Transit District Act. First, because we find that UMTA does not create a federal cause of action against state transit recipients, appellants do not state a claim under UMTA. Second, we hold that appellants' claim under Utah Code § 17A-2-1031 is legally insupportable under

either our primary analysis or the district court's alternative analysis.[3]

B. Certification Claim against DOL

DOL certified UTA's bargaining unit in 2001. Appellants argue that the certification violated DOL's duty under UMTA. The district court dismissed the action against DOL for failure to state a claim, noting that appellants "failed to plead or otherwise allege that the agency had any knowledge or information regarding the current labor dispute when it made the challenged certification decision in October 2001." Aplt. App. B. at 282-83.

After reviewing de novo the district court's dismissal of appellants' claim against DOL pursuant to Federal Rule of Civil Procedure 12(b)(6), we find no violation. *See Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir. 2006). States must only preserve "the essence of federally-defined collective bargaining rights," *Donovan*, 767 F.2d at 950-51, by ensuring both that the state's protective arrangements are "fair and equitable" and that they provide for the "continuation of collective bargaining rights." 49 U.S.C. § 5333(b). In other words, employees, "at a minimum, . . . are entitled to be represented in meaningful, 'good faith' negotiations with their employer over wages, hours and other terms and conditions

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[3] Because we find that the district court's grant of summary judgment was proper, we agree with both appellants and Local 382 that the district court exercised its discretion in dismissing the state-based claim against Local 382 for lack of subject matter jurisdiction. *See* 28 U.S.C. § 1367(c)(3); *Exum v. U.S. Olympic Comm.*, 389 F.3d 1130, 1138-39 (10th Cir. 2004) (approving dismissal of state law claims for lack of subject matter jurisdiction after summary judgment was granted as to all federal claims).

of employment." *Donovan*, 767 F.2d at 951. As we previously found, UTA has met this standard. Accordingly, we find no error in DOL's certification of UTA's protective arrangements in 2001 and 2005.

C. Lack of Discovery

Before the district court granted summary judgment, appellants had requested discovery on the following issues: (1) whether Local 382 enjoyed majority support; (2) whether John Inglish, UTA General Manager, gave special benefits to the union president for favorable treatment during negotiations; and (3) whether safety has been compromised as a result of representation by Local 382. [Aplt's App. at 146-48]. The district court denied discovery, noting that appellants failed to demonstrate a sufficient nexus between the information they hoped to discover and UTA's motion for summary judgment.

We review a district court's denial of a Rule 56(f) motion for abuse of discretion. *Bliss v. Franco*, 446 F.3d 1036, 1042 (10th Cir. 2006). Rule 56(f) provides:

> Should it appear from the affidavits of a party opposing [a motion for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The central tenet of Rule 56(f) is that "summary judgment [should] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his

opposition." *Price ex rel. Price v. W. Res., Inc.*, 232 F.3d 779, 783 (10th Cir. 2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). However, Rule 56(f) relief is not automatic. The affidavit must identify "the probable facts not available and what steps have been taken to obtain these facts." *Id.* (quotation omitted). Additionally, it must "state[] with specificity how the additional material will rebut the summary judgment motion." *Bliss*, 446 F.3d at 1042 (quotation omitted).

While the appellants' affidavit briefly lists the additional discovery they believe necessary, it fails to do so with any specificity, *see id.*, and with any hint of what facts such discovery is expected to unearth. *See Price*, 232 F.3d at 783. Appellants argue that discovery is necessary as to whether Local 382 enjoys majority support. But considering the undisputed evidence showing a majority of UTA employees ratified both the 1999 and 2004 collective bargaining agreements, additional discovery would be of marginal utility. Based on the affidavit's lack of specificity and its questionable relevance to the motion for summary judgment, we find no abuse of discretion. *See Bldg. & Constr. Dep't v. Rockwell Int'l Corp.*, 7 F.3d 1487, 1496 (10th Cir. 1993) (finding no abuse where district court denied Rule 56(f) motion on grounds of relevance).

D. Motion to Amend

Minutes before midnight on August 14, 2005, appellants filed a motion to amend pursuant to Rule 15(a). The district court did not act on the motion. We see no error.

"Filing a timely notice of appeal pursuant to Fed. R. App. P. 3 transfers the matter from the district court to the court of

appeals. The district court is thus divested of jurisdiction. Any subsequent action by it is null and void." *Garcia v. Burlington N. R. Co.*, 818 F.2d 713, 721 (10th Cir. 1987); *see Lancaster v. Indep. Sch. Dist. No. 5*, 149 F.3d 1228, 1237 (10th Cir. 1998). Here, appellants filed a notice of appeal on August 22. This appeal immediately divested the district court of jurisdiction, except over collateral matters. *See Lancaster*, 149 F.3d at 1237 (noting that district courts retain jurisdiction over collateral matters). Because the motion to amend was not collateral, the district court had no jurisdiction to act on the motion.

III. Conclusion

Accordingly, we AFFIRM the district court's dismissal of appellants' claims against DOL, Local 382, and John Inglish; AFFIRM the district court's grant of summary judgment for UTA; and DENY as moot appellants' appeal of the denial of the motion for a preliminary injunction.

APPENDIX C

IN THE UNITED STATES COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2:04-CV-00985 PGC

[Filed August 15, 2005]

LISA BURKE and MICHAEL CARPER, individually and on behalf of all others similarly situated, Plaintiffs,	)
vs.	)
UTAH TRANSIT AUTHORITY, JOHN INGLISH, individually, and LOCAL 382 OF THE AMALGAMATED TRASIT UNION, Defendants.	)

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In this labor dispute, plaintiffs (several light-rail or "TRAX" operators) and defendants, Utah Transit Authority ("UTA"), John Inglish, and Local 382 of the Amalgamated Transit Union ("Local 382") have filed cross-motions for summary judgment on plaintiff's collective bargaining and First Amendment claims. Specifically, plaintiffs seek partial

summary judgment that the TRAX division of UTA should be considered as a separate bargaining unit from the rail division. Defendants, for their part, seek summary judgment on plaintiffs' § 1983 claims alleging that UTA and John Inglish violated their First Amendment rights to free speech and free association, on plaintiffs' claims under § 13(c) of the Federal Transit Act alleging a breach of the agreement between the Department of Labor and UTA under the Act, and on plaintiffs' claims under Utah Code Ann. § 17A-2-1031, alleging failure to protect the employees' rights to choose their own labor representatives.

Plaintiffs argue that they are entitled to a summary ruling that the TRAX division be considered a separate bargaining unit because precedent suggests that the division was improperly "accreted" into the larger unit at the time of TRAX's creation. As a result of this improper accretion, plaintiffs believe that UTA has denied them their right under state and federal law to be represented, for collective bargaining purposes, by separate representatives of their own choosing. Defendants maintain that there has been no breach of the § 13(c) agreement, and thus no violation of collective bargaining rights under the law. Further, defendants argue that no violation of Utah law has occurred because this court has already held that UTA bargained with "an appropriate unit" at the time of the most recent collective bargaining negotiations. Finally, defendants cite clear precedent to the effect that TRAX employees' First Amendment rights were not violated when they were forbidden from posting certain union information on UTA company and employee bulletin boards.

The court concludes that plaintiffs have not established that the TRAX division should be considered a separate bargaining unit and thus DENIES plaintiffs' motion for partial

summary judgment on this issue. The court further finds that the undisputed facts demonstrate that UTA, John Inglish, and Local 382 did not violate plaintiffs' collective bargaining rights either under federal or state law. UTA and John Inglish also did not violate plaintiffs' First Amendment rights to free speech and free association. Nor would further discovery, as plaintiffs have urged, be likely to lead to any evidence supporting plaintiffs' claims. Accordingly, the court GRANTS defendants' motion for summary judgment on all of plaintiffs' claims.

I. BACKGROUND

Local 382 has represented UTA transit employees continuously since 1904. Initially, the Local represented only streetcar employees. During the 1940s, the Local came to represent both bus and streetcar employees when buses were being phased into Salt Lake's transit system. Later, streetcars disappeared into the dustbin of history, but the Local continued to represent UTA's bus employees.

In 1995, UTA determined to (re)introduce light rail transport and entered into an agreement with Local 382 providing essentially that it would represent the new light rail division employees whose work was comparable to that of bus division employees. In December of 1998, UTA and Local 382 reached a collective bargaining agreement providing that light-rail or "TRAX" employees would come from UTA's existing bus divisions and that bus drivers transferring to the light rail division would retain their bus division seniority rights. Most, if not all, of the plaintiffs in this case transferred into their light rail jobs from UTA bus divisions under the terms of this agreement.

The issues presented in this lawsuit arose in 2003 when negotiations between the union and UTA began on a new collective bargaining agreement. In the course of these negotiations, several TRAX employees petitioned management demanding separate union representation. Recognition of this right was not forthcoming and, on August 10, 2004, the new collective bargaining agreement was ratified by the union membership. This new agreement contained the same provisions regarding transfer of bus employees into the TRAX division with existing bus division seniority rights.

Plaintiffs, several TRAX operators, then filed suit against the defendants. In their complaint, plaintiffs alleged collective bargaining and First Amendment violations. As to collective bargaining, plantiffs allege that UTA violated both federal and state labor laws in failing to recognize their right to representation by a union separate and apart from that for the bus division. These claims were the subject of plaintiffs' earlier motion for preliminary injunction, in which they sought an order enjoining UTA (1) from transferring any bus employees to the TRAX division, (2) from transferring bus employees to the TRAX division with seniority rights that would trump the seniority rights of existing TRAX employees, and (3) from interfering with plaintiffs' First Amendment rights to free speech and free association by denying plaintiffs' access to post union information on company and employee bulletin boards.

After full briefing and oral argument, the court denied plaintiffs' motion for preliminary injunction, finding plaintiffs' unlikely to prevail on the merits of their claims. Subsequently, defendant United States Department of Labor moved for dismissal of all claims against it. This motion was granted as there was no evidence nor had plaintiffs' ever

alleged that the Department had before it any information about the relevant labor dispute at the time the agency made the 13(c) certification decision plaintiffs' were challenging. The remaining parties' cross-motions for summary judgment followed and are now pending decision.

II. STANDARD OF REVIEW

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[1] Further, in determining the appropriateness of summary judgment, the court must "view the evidence, and draw reasonable inferences therefrom, in the light most favorable to the non-moving party."[2]

III. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants seek summary judgment on plaintiffs' collective bargaining claims and § 1983 claims. Plaintiffs base their collective bargaining claims on UTA's alleged violations of § 13(c) of the Federal Transit Act and § 17A-2-1031 of the Utah Code. Plaintiffs § 1983 claims allege that UTA has violated their First Amendment rights to free speech and association by not allowing them to post competing organizing

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[1] Fed.R.Civ.P. 56(c).

[2] *Combs v. Pricewaterhousecoopers, LLP,* 382 F.3d 1196, 1199 (10th Cir.2004).

information on company and employee bulletin boards. The court will examine each of these claims in turn.

A. Section 13(c) of the Federal Transit Act and Utah Code Ann. § 17A-2-1031

Among other things, the Federal Transit Act governs the obligations of public transit systems which receive federal funding. Section 13(c) of the Act provides that

> (1) As a condition of financial assistance under [the Act], the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable.

And this section also conditions federal funding on

> (A) the preservation of rights, privileges and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;
> (B) the continuation of collective bargaining rights;
> (C) the protection of individual employees against a worsening of their positions related to employment.

Additionally, under Utah state law,

> Employees of any public transit system established and operated by the district shall have the right to self-organization, to form, join, or assist labor organizations and to bargain collectively through representation of their own choosing provided, however, that such employees and labor organizations shall not have the right to join in any strike against such public transit system. The district *shall recognize*

> *and bargain exclusively with any labor organization representing a majority of its employees in an appropriate unit with respect to wages, salaries, hours, working conditions, and welfare and pension and retirement provisions,* and, upon reaching agreement with such labor organization, to enter into and execute a written contract incorporating therein the agreements so reached.[3]

By refusing to recognize the right of TRAX employees to be represented separately from bus division employees, plaintiffs have claimed that UTA violated their collective bargaining rights under federal and state labor laws - specifically, § 13(c) of the Federal Transit Act and Utah Code § 17A-2-1031.

To defeat summary judgment on these claims, plaintiffs must establish a factual or legal basis for determining that this case should be treated as an "accretion" case under existing labor law precedents. An accretion case is one in which the propriety of a new group being added to an existing bargaining unit without a representation election is challenged. Plaintiffs argue that *Baltimore Sun Company v. National Labor Relations Board,*[4] *Boire v. International Brotherhood of Teamsters,*[5] and *Gitano Group*[6] - all accretion cases - govern the outcome of this case and support a finding of unfair labor practices on the part of UTA. Yet these cases are factually distinguishable from the present action.

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[3] UTAH CODE ANN. § 17a-2-1031 (2004) (emphasis added).

[4] 257 F.3d 419 (4th Cir. 2001).

[5] 479 F.2d 778 (5th Cir. 1973).

[6] 308 N.L.R.B. 1172.

Baltimore Sun involved a group of employees who the company would not agree to let the union represent. *Boire* involved a group of entirely new, non-union, independent contractors added when the company opened a new facility in another state. *Gitano Group* is distinguishable because the union in that case objected to the representation, whereas here no party objected to Local 382's representation of the TRAX division employees during the relevant time-frame. Further, *Gitano* would seem to suggest that even if a presumptive separate bargaining unit had been created by the transfer of employees to the new TRAX location, the presumption would be that those employees continue to support the old union.

In this case, the union forged an agreement with UTA before the creation of the light rail division to represent UTA's future light rail employees. As part of this agreement, the union was able to secure transfer and seniority rights for bus division employees wishing to join TRAX. In turn, the majority of TRAX's initial work force was comprised of employees who had transferred to the new light rail division from the bus division under the terms of this agreement. Indeed, that very agreement was ratified by the full bus division membership before these transfers.

Given these undisputed facts, this case is one in which plaintiffs seek "severance" from an existing bargaining unit instead of one in which plaintiffs have been improperly "accreted" to an already existing unit. Plaintiffs' ability to prevail on summary judgment regarding its collective bargaining claims, then, hinges on raising any factual or legal basis for determining that a bargaining unit made up of *both* bus and TRAX employees is not an appropriate bargaining unit for purposes of § 13 (c) of the Federal Transit Act or Utah Code Ann. § 17A-2-1031. Plaintiffs have failed to do so.

For starters, the National Labor Relations Board has previously ruled in an analogous case involving both bus and streetcar operators of a public transportation system that a "system-wide unit, including both operating and maintenance employees, is the most appropriate unit."[7] Even though the National Labor Relations Board lacks jurisdiction over public entities, the NLRB's pronouncements are persuasive on the issue of the appropriateness of a given bargaining unit here.

Moreover, history and current national standard practice also fail to support plaintiffs' claims. As noted earlier, Local 382 represented Salt Lake's streetcar operators from 1904 up until the 1940s - at which point it represented *both* bus and streetcar drivers until streetcars were permanently phased out of service. Also, across the country, many public transit systems with light rail operations bargain with units routinely made up of both bus and light rail employees.

Federal law requires only that the collective bargaining rights of public transit employees be preserved. Utah law requires only that UTA bargain with *"an* appropriate unit," not *the most* appropriate unit. Given NLRB precedent, Local 382's history in representing Salt Lake public transit employees, and common practices around the nation, the court would be hard pressed to conclude that a collective bargaining unit made up of both bus and light rail employees is somehow "inappropriate." Plaintiffs have raised no factual issue, nor could they if further discovery were allowed, to demonstrate that a bargaining unit made up of both bus and light rail employees is "inappropriate." Therefore, defendants

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[7] *National Labor Relations Board v. St. Louis Public Service Co.*, 77 N.L.R.B. 749, 755 (1948).

are entitled to summary judgment on plaintiffs' § 13(c) and Utah state law claims.

B. Plaintiffs' First Amendment Claims

Defendants also seek summary judgment on plaintiffs' claims under § 1983 alleging violation of the First Amendment. Plaintiffs have alleged that UTA and John Inglish violated their rights to free speech and free association under the First Amendment by prohibiting employees from posting union information on UTA bulletin boards and by refusing to bargain separately with a representative of rail division employees alone.

To defeat summary judgment, plaintiffs must demonstrate some factual or legal basis that would support the conclusion that either UTA or John Inglish violated their First Amendment rights to free speech or free association. Plaintiffs maintain that UTA has violated their First Amendment right to free speech by not allowing them to post competing organizing information on company and employee bulletin boards. However, plaintiff's position is contrary to the Supreme Court's decision in *Perry Education Association v. Perry Local Educators' Association,*[8] which held that a collective bargaining agreement denying a rival union access to teacher mailboxes and the interschool mail system did not violate the First Amendment. *Perry Education Association* explains that the "exclusion of the rival union may reasonably be considered a means of insuring labor peace within the schools."[9] "The policy," the decision continues, "serves to

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[8] 460 U.S. 37 (1983).

[9] *Id.* at 52.

prevent the District's schools from becoming a battlefield for inter-union squabbles."[10] Plaintiffs have not distinguished their First Amendment claim from the one at issue in *Perry*. To the contrary, *Perry Education Association* appears to govern and preclude plaintiffs' free speech claim.

Similarly, to avoid summary judgment on their free association claim, plaintiffs must demonstrate facts or law establishing that UTA or John Inglish has violated plaintiffs' right to free association by continuing to bargain with Local 382 and refusing to bargain separately with a representative of the TRAX employees only. As a matter of law, however, government employers have no obligation to recognize or bargain with any employee association.[11] Although the First Amendment imposes no affirmative obligation on UTA to recognize or bargain with a separate TRAX-employee union, it does grant TRAX employees the right to associate and speak freely without threat of retaliation.[12] Yet the only evidence presented by plaintiffs suggestive at all of some form of "retaliation" by UTA are the allegations about John Inglish riding buses in an attempt to "intimidate" TRAX employees from joining in the fight for separate union representation. This is, however, very thin evidence that Mr. English did anything truly "retaliatory" for purposes of the First Amendment as his actions were not, strictly speaking, job-related. Because plaintiffs have not alleged that UTA took any adverse employment actions against them by virtue of their

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[10] *Id.* (quoting *Haukvedahl v. School District No. 108,* No. 75C-3641 (N.D.Ill.1976)).

[11] *Smith v. Arkansas Highway Employees Local 1315,* 441 U.S. 463,465 (1979).

[12] *Id.*

attempts to obtain separate union representation, plaintiffs' right to free association has not been violated. Moreover, even if plaintiffs could show that UTA interfered with employees' free association rights, it is not at all clear that Ms. Burke or Mr. Carper would have adequate standing to raise these claims, as they would essentially be attempting to assert the rights not of themselves, but of third parties. Neither Ms. Burke nor Mr. Carper, for example, appears to have been on any of the buses allegedly ridden by Mr. Inglish, and although the court need not decide the issue as it has not been raised by any of the parties, it is clearly debatable whether under these factual circumstances plaintiffs could demonstrate adequate standing to even bring their free association claims in the first instance.

As *Perry* and *Smith* are legally dispositive of plaintiffs' § 1983 First Amendment claims, defendants' motion for summary judgment on these claims is granted.

IV. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs have also sought partial summary judgment seeking an order declaring the TRAX division to be a separate bargaining unit for purposes of collective bargaining with UTA. Given the court's ruling that defendants are entitled to summary judgment on all claims - and particularly because the court found that the system-wide unit recognized in the most recent contract negotiations was not "inappropriate" - plaintiffs' motion for partial summary judgment is DENIED.

V. PLAINTIFF'S 56(f) ARGUMENT

Plaintiffs oppose summary judgment on their claims by raising an argument under Fed.R.Civ.P. 56(f) that further

discovery is needed before they can respond adequately to the arguments raised in favor of summary judgment. However, plaintiffs give scant detail as to what information they hope to develop through further discovery, and, more important, fail to establish a sufficient nexus between this information and the claims at issue. Absent a demonstration of this nexus, the court does not see how the analysis would be altered by further discovery. Accordingly, plaintiffs' request for a Rule 56(f) continuance is denied.

The court also notes that it was hindered in its evaluation by plaintiffs' failure to comply with Local Rule 56(c), which requires that in memoranda opposing summary judgment,

> [e]ach fact in dispute must be numbered, must refer with particularity to those portions of the record on which the opposing party relies and, if applicable, must state the number of the movant's fact that is disputed.

Failure to do this results in the admission of all of movant's facts not specifically controverted as outlined in the rule. Although not necessary for the court's grant of summary judgment, the court nonetheless deems as admitted all of defendants' facts not specifically controverted by plaintiffs in their memorandum in opposition to summary judgment in accordance with Local Rule 56(c).

VI. CONCLUSION

Because plaintiffs have not shown any triable issues of fact or legal basis for their claims, defendants' motion for summary judgment is GRANTED. Plaintiffs' motion for partial summary judgment is, accordingly, DENIED. The Clerk of Court is directed to close this case.

DATED this 15th day of August, 2005.

BY THE COURT:

/s/
Paul G. Cassell
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2:04-CV-985 PGC

[Filed April 7, 2005]

LISA BURKE, et al.,	)
Plaintiffs,	)
	)
vs.	)
	)
UTAH TRANSIT AUTHORITY, et al.,	)
Defendants.	)
	)

ORDER GRANTING U.S. DEPARTMENT OF LABOR'S MOTION TO DISMISS

Defendant, the United States Department of Labor, has moved to dismiss plaintiffs' claims against it pursuant to Fed.R.Civ.P. 12(b)(1) and (6) in the above-referenced matter. Plaintiffs oppose dismissal, arguing that the agency's certification decisions under 49 U.S.C. § 5333(b) (formerly § 13(c) of the Urban Mass Transportation Act) are properly subject to judicial review.

As an initial matter, the court agrees with plaintiffs that agency certification decisions under 49 U.S.C. § 5333(b) are

amenable to judicial review. It is evident, however, that any such review would be limited to the record before the agency at the time of the certification decision at issue. But plaintiffs have failed to plead or otherwise allege that the agency had any knowledge or information regarding the current labor dispute when it made the challenged certification decision in October of 2001. Absent any such allegations, plaintiffs have failed to state a claim upon which relief may be granted and their claims against the U.S. Department of Labor should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6).

Accordingly, the U.S. Department of Labor's motion to dismiss (29-1) is GRANTED.

DATED this 6th day of April, 2005.

BY THE COURT:

/s/
Paul G. Cassell
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

Civil No. 2:04-CV-00985

[Filed April 5, 2005]

LISA BURKE and MICHAEL CARPER, individually and on behalf of all others similarly situated, Plaintiffs,	)
v.	)
UTAH TRANSIT AUTHORITY, JOHN INGLISH, INDIVIDUALLY, LOCAL 382 OF THE AMALGAMATED TRANSIT UNION AND THE UNITED STATES DEPARTMENT OF LABOR, Defendants.	)

MOTION FOR A FINAL ORDER

Judge PAUL CASSELL

Plaintiffs, through counsel, move the Court to issue a final order on the request for a preliminary injunction. On March 10, 2005 an unsigned docket entry appeared. It denied the preliminary injunction. Your Honor's Court Clerk has told

Plaintiffs' counsel that no other order will be issued. Plaintiffs desire to appeal the order to the Tenth Circuit Court. However, persuasive case law questions whether such an unsigned docket entry satisfies the requirement for a final order since it can be changed by the court at any time. See *Carter v. Beverly Hills Savings and Loan Ass'n, 884 F.2d 1186, 1190 (9th Cir. 1989)," Chicago Ass'n. of Commerce & Industry v. Thomas* 1987 U.S. Dist. LEXIS 11722 (IL. 1987).

Thus, Plaintiffs request that an order be issued that clearly satisfies the requirements of Rule 58 of the Federal Rules of Civil Procedure.

Dated this 4th day of April, 2005.

/s/
Edward T. Wells,
Attorney for Plaintiffs

APPENDIX F

MINUTES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CASE NO. 2:04-CV-00985

[Filed March 9, 2005]

Burke, et al.	)
	)
v.	)
	)
UTA	)
	)

JUDGE: Hon. Paul G. Cassell
COURT REPORTER: Laura Robinson
COURTROOM DEPUTY: Yvette Evans

APPEARANCE OF COUNSEL
Pla Mel Martin
Pla Daniel Moquin
Dft Jennifer Rigby
Dft Michael Blue
Dft Scott Hagen
Dft Jeffrey Kahn
Dft Joseph Hatch

DATE: Wednesday, March 9, 2005 at 10:00 a.m.

MATTER SET: Motion to Dismiss Count V of pla's cmp

DOCKET ENTRY:

Counsel present. Court DENIES the motion for reconsideration of the denial of the preliminary injunction. Argument is presented with regard to motion to dismiss [28-1]. The court takes the matter under advisement and will issue a ruling shortly. UTA and Union will file any MSJ by 3/25/2005. Counsel will contact Judge Nuffer to vacate the IPT on 4/13/05. A hearing on any msj's will be held on May 20, 2005 at 3:00.

APPENDIX G

IN THE UNITED STATES COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2:04-CV-00985 PGC

[Filed January 25, 2005]

LISA BURKE and MICHAEL CARPER, individually and on behalf of ail others similarly situated, Plaintiffs,	)
vs.	)
UTAH TRANSIT AUTHORITY, JOHN INGLISH, individually, LOCAL 382 OF THE AMALGAMATED TRASIT UNION and the UNITED STATES DEPARTMENT OF LABOR, Defendants.	)

ORDER DENYING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

In this labor dispute, plaintiffs (several light-rail or "TRAX" operators) have moved for a preliminary injunction enjoining defendant, Utah Transit Authority (UTA), (1) from transferring any bus employees to the TRAX division, (2)

from transferring bus employees to the TRAX division with seniority rights that would trump the seniority rights of existing TRAX employees, and (3) from interfering with plaintiffs' First Amendment rights to free speech and association by denying them access to post union information on company and employee bulletin boards pending the outcome of this litigation. Plaintiffs argue that they are entitled to this relief because UTA has denied them their right under state and federal law to be represented, for collective bargaining purposes, by separate representatives of their own choosing. Local 382 of the Amalgamated Transit Union (Local 382) represented and bargained on behalf of both bus and light-rail UTA employees in the most recent collective bargaining negotiations. The TRAX employees believe they were entitled to separate union representation and accordingly argue that the collective bargaining agreement now in place violates both federal and state labor statutes requiring that employers respect the collective bargaining rights of their employees. Plaintiffs further allege that UTA has violated their First Amendment rights by refusing to allow them to post certain union information on UTA company and employee bulletin boards.

The court concludes that plaintiffs have not established that they are substantially likely to prevail on the merits of their claims at trial. Because this is the basic requirement in order to obtain injunctive relief, plaintiffs' motion for preliminary injunction is denied.

I. Background

Local 382 has represented UTA transit employees continuously since 1904. Initially, the Local represented only streetcar employees, but then came to represent both bus and streetcar employees during the 1940s when buses were being

phased into Salt Lake's transit system. After streetcars disappeared into the dustbin of history, the Local continued to represent UTA's bus employees up until light rail transport was (re)introduced in the 1990s.

In 1995, UTA and Local 382 entered into an agreement providing essentially that Local 382 would represent the new light rail division employees whose work was comparable to that of bus division employees. In December of 1998, UTA and Local 382 reached a collective bargaining agreement providing that light-rail employees would come from UTA's existing bus divisions and that bus drivers transferring to the light rail division would retain their bus division seniority rights. Most, if not all, of the plaintiffs in this case transferred into their light rail jobs from UTA bus divisions under the terms of this agreement.

The issues presented in this lawsuit first arose in 2003 when negotiations between the union and UTA began on a new collective bargaining agreement. In the course of these negotiations, TRAX employees petitioned management demanding separate union representation. Recognition of this right was not forthcoming and, on August 10, 2004, the new collective bargaining agreement was ratified by the union membership. This new agreement contained the same provisions regarding transfer of bus employees into the TRAX division with existing bus division seniority rights.

Plaintiffs then filed suit against UTA (among others). Plaintiffs raise collective bargaining claims and a First Amendment claim. As to collective bargaining, plantiffs allege that UTA violated both federal and state labor laws in failing to recognize their right to separate union representation. Plaintiffs seek an injunction aimed at preventing UTA from further transferring any bus employees

to the TRAX division or from granting transferred employees seniority rights superior to those of employees already in the TRAX division. As to the First Amendment, plaintiffs seek an injunction barring UTA from interfering any further with their attempts to post information regarding their rights to separate union representation. Neither the collective bargaining nor the First Amendment claim is persuasive.

II. Plaintiffs' Motion for a Preliminary Injunction

A. Collective Bargaining Claims

Plaintiffs first argue they are entitled to an injunction on their collective bargaining claims. The standard for granting a preliminary injunction is well known. To establish their right to injunctive relief, Plaintiffs must show "(1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the [plaintiffs] if the preliminary injunction is denied; (3) the threatened injury to the [plaintiffs] outweighs the injury to the other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest."[1] Where, as here, the plaintiffs (the moving parties) seek to disturb the *status quo* (in this case, by altering the terms of an existing collective bargaining agreement), each of these elements must "weigh heavily and compellingly in [plaintiffs'] favor before such an injunction can be issued."[2]

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[1] *Salt Lake Tribune Publishing Co., LLC v. AT&T Corp., et al.*, 320 F.3d 1081, 1099 (10th Cir. 2003) (quoting *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001)).

[2] *Id.* (quoting *Kikamura*, 242 F.3d at 955)(internal quotations omitted).

As an initial matter, then, plaintiffs must demonstrate that they are likely to succeed on the merits of their claims in order to obtain their requested relief. Plaintiffs base their collective bargaining claims on UTA's alleged violations of § 13(e) of the Federal Transit Act and § 17A-2-1031 of the Utah Code. Among other things, the Federal Transit Act governs the obligations of public transit systems which receive federal funding. Section 13(c) of the Act provides that

> (1) As a condition of financial assistance under [the Act], the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable.

And this section also conditions federal funding on

> (A) the preservation of rights, privileges and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;
> (B) the continuation of collective bargaining rights;
> (C) the protection of individual employees against a worsening of their positions related to employment.

Additionally, under Utah state law,

> Employees of any public transit system established and operated by the district shall have the right to self-organization, to form, join, or assist labor organizations and to bargain collectively through representation of their own choosing provided, however, that such employees and labor organizations shall not have the right to join in any strike against such public transit system. The district *shall recognize and bargain exclusively with any labor organization*

> *representing a majority of its employees in an appropriate unit with respect to wages, salaries, hours, working conditions, and welfare and pension and retirement provisions,* and, upon reaching agreement with such labor organization, to enter into and execute a written contract incorporating therein the agreements so reached.[3]

By refusing to recognize the right of TRAX employees to be represented separately from bus division employees, plaintiffs argue that UTA violated their collective bargaining rights under federal and state labor laws -specifically, § 13(c) of the Federal Transit Act and Utah Code § 17A-2-1031.

Plaintiffs urge the court to treat this an "accretion" case under existing labor law precedents. An "accretion" case in one in which the propriety of a new group being added to an existing bargaining unit without a representation election is challenged. Plaintiffs argue that *Baltimore Sun Company v. National Labor Relations Board*[4] *and Boire v. International Brotherhood of Teamsters*[5] *-both* "accretion" cases-govern the outcome of this case and support a finding of unfair labor practices on the part of UTA. Yet both cases are factually distinguishable from the present action-*Baltimore Sun* because it involved a group of employees who the company would not agree to let the union represent or bargain for, and *Boire* because it involved a group of entirely new, non-union, independent contractors added when the company opened a new facility in another state. Here, the union forged an

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[3] UTAH CODE ANN. § 17a-2-1031 (2004) (emphasis added).

[4] 257 F.3d 419 (4th Cir. 2001).

[5] 479 F.2d 778 (5th Cir. 1973).

agreement with UTA before the creation of the light rail division to represent UTA's future light rail employees. As part of this agreement, the union was able to secure transfer and seniority rights for bus division employees wishing to join TRAX. In turn, the majority of TRAX's initial work force was comprised of employees who had transferred to the new light rail division from the bus division under the terms of this agreement. Indeed, that very agreement had been ratified by the full bus division membership before these transfers.

Given these facts, the court views the present case as one in which plaintiffs seek "severance" from an existing bargaining unit instead of one in which plaintiffs have been improperly "accreted" to an already existing unit. Plaintiffs' ability to prevail on its collective bargaining claims, then, hinges on proving that a bargaining unit made up of *both* bus and TRAX employees is not an appropriate bargaining unit for purposes of § 17A-2-1031 or § 13(c) of the Federal Transit Act. The plaintiffs have offered little to support this position.

For starters, the National Labor Relations Board has previously ruled in an analogous case involving both bus and streetcar operators of a public transportation system that a "system-wide unit, including both operating and maintenance employees, is the most appropriate unit."[6] Even though the National Labor Relations Board has no jurisdiction over public entities, the NLRB's pronouncements are persuasive on the issue of the appropriateness of a given bargaining unit here.

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[6] *National Labor Relations Board v. St. Louis Public Service Co.*, 77 N.L.R.B. 749, 755 (1948).

Moreover, history and current national standard practice also fail to support plaintiffs' claims. As noted earlier, Local 382 represented Salt Lake's streetcar operators from 1904 up until the 1940s - at which point it represented *both* bus and streetcar drivers until streetcars were permanently phased out of service. UTA has also presented ample evidence that across the country many public transit systems with light rail operations bargain with units routinely made up of both bus and light rail employees.

Federal law only requires that the collective bargaining rights of public transit employees be preserved. Utah law only requires UTA to bargain with *"an* appropriate unit," not the *most* appropriate unit. Given NLRB precedent, Local 382's history in representing Salt Lake public transit employees, and standard practices around the nation, the court would be hard pressed to conclude that a collective bargaining unit made up of both bus and light rail employees is somehow "inappropriate." Because the available evidence fails to support plaintiffs' claims, it follows that plaintiffs have not demonstrated a substantial likelihood of success on the merits of their claims and thus, that their request for preliminary injunctive relief must be denied.

B. Plaintiffs' First Amendment Claim

Similarly, on their First Amendment claim, plaintiffs have failed to demonstrate a likelihood of success on the merits. Plaintiffs maintain that UTA has violated their First Amendment rights by not allowing them to post competing organizing information on company and employee bulletin boards. However, plaintiff's argument is severely undercut by the Supreme Court's decision in *Perry Education Association*

v. Perry Local Educators' Association,[7] which held that a collective bargaining agreement denying a rival union access to teacher mailboxes and the interschool mail system did not violate the First Amendment. *Perry Education Association* explains that the "exclusion of the rival union may reasonably be considered a means of insuring labor peace within the schools."[8] "The policy," the decision continues, "serves to prevent the District's schools from becoming a battlefield for inter-union squabbles."[9]

Plaintiffs have not persuasively distinguished their First Amendment claim from the one at issue in *Perry*. To the contrary, *Perry Education Association* seems quite similar. In any event, to obtain a preliminary injunction, the plaintiffs must shoulder the burden of showing a likelihood of success on the merits. This they have failed to do, and their motion for preliminary injunctive relief on this claim is accordingly denied.

III. Conclusion

The plaintiffs have failed to show a likelihood of success on the merits for either their collective bargaining claims or their First Amendment claims. Because such a showing is the basic prerequisite for a preliminary injunction, their motion for such an injunction (# 10-1) is denied. In light of this disposition, the court need not resolve the more difficult issue

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[7] 460 U.S. 37 (1983).

[8] *Id.* at 52.

[9] *Id.* (quoting *Haukvedahl v. School District No. 108,* No. 75C-3641 (N.D.Ill.1976)).

of whether the anti-injunction provisions of the Norris-LaGuardia Act apply to actions involving public entities.

DATED this 25th day of January, 2005.

BY THE COURT:

/s/
Paul G. Cassell
United States District Judge

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 05-4079 and 05-4222

[Filed September 15, 2006]

Lisa Burke, Michael Carper, *et al.*	)
Plaintiffs -Appellants,	)
	)
v.	)
	)
Utah Transit Authority, *et al.*	)
Defendants -Appellees.	)
	)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

The Honorable Paul G. Cassell
District Judge

PETITION FOR EN BANC REVIEW

ENTITLEMENT TO EN BANC REVIEW

I. THE TENTH CIRCUIT SHOULD GRANT EN BANC REVIEW DUE TO THE IMPORTANCE OF THIS DECISION TO THOUSANDS OF TRANSIT WORKERS AND THE IMPLICIT CONFLICT WITH A DISTRICT OF COLUMBIA CIRCUIT'S DECISION.

The central issue, the protection afforded to transit workers to choose their bargaining unit and representative under the Urban Mass Transportation Act "(UMTA") was one of first impression, not only in the Tenth Circuit but in the entire United States. The issue is of exceptional importance because the decision can impact the rights of thousands of transit workers within the Tenth Circuit and will be cited precedent in the rest of the United States. The Panel's view of Section 13(c)(2)(B) as codified at 49 U.S.C. §5333(b) does not allow the TRAX employees to insist that either the Utah Transit Authority ("UTA") respect their right to be in an appropriate bargaining unit as defined by federal standards or the Department of Labor ("DOL") must cut-off federal funds to the state agency. This is despite 49 U.S.C. §5333(b) which states:

> (1) As a condition of financial assistance under sections 5307-5312, 5318(d), 5323(a)(1), (b), (d), and (e), 5328, 5337, and 5338(b) of this title **the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable. The agreement granting the assistance under sections** 5307-5312, 5318(d), 5323(a)(1), (b), (d), and (e), 5328, 5337, and 5338(b) shall specify the arrangements.
>
> (2) Arrangements under this subsection shall include the provisions that may be necessary for-.....

(B) **the continuation of collective bargaining rights;**

.....

§ 13(c), 49 U.S.C. § 5333(b) (emphasis added).

Additionally, the D.C. Circuit Court has stated about UMTA:

> The legislative history, therefore, reveals Congress' clear intent to measure state labor laws against the standards of collective bargaining established by federal labor policy. The Secretary's contrary construction of section 13(c) would produce a meaningless tautology: if state law defines the "collective bargaining rights" that must be continued under the federal statute, then a public transit authority's labor relations always will be in compliance with section 13(c), because by definition a state transit authority will be in conformity with state law. Congress clearly did not envision section 13(c)(2) operating in such a fashion.

Amalgamated Transit Union Intl' v. Donovan, 767 F.2d 939, 948 (D.C. Cir. 1985).

The decision by the Panel creates such a tautology by interpreting Utah law, passed to be in compliance with UMTA, as not protecting the most basic bargaining right of employees; the right to select a bargaining representative in an appropriate bargaining unit despite the fact that the Utah law was passed to make UTA eligible for federal funds. In that sense it is in conflict with the D.C. Circuit even if the precise issue was not addressed by them.

II. STATEMENT OF THE CASE

This case involves a group of public employees involved in a light rail operation called TRAX, attempting to protect their free association rights not to have an employer-approved bargaining representative imposed upon them. The TRAX employees, while not covered by the National Labor Relations Act ("NLRA"), have equivalent rights guaranteed by UMTA and Utah State law. 49 U.S.C. §5333(b); Utah Code ANN. § 17A-2-1031 (2004) (Att. B). Despite this and approximately 63% of the employees indicating to the state employer, UTA, that they reject the present bargaining representative, UTA is imposing the bargaining representative on the TRAX employees and not allowing them to choose their own bargaining representative, chosen by members of an appropriate bargaining unit. The Trial Court and the Panel have endorsed this action by creating their own legal standards for the determination of an appropriate bargaining unit. In doing so they have abandoned the accepted legal standards used throughout the United States and have prejudiced the Appellants by asserting that they did not raise disputes of material facts prior to knowing the standard which created materiality. The Appellants have demonstrated that under established standards there are factors that support a finding of a separate bargaining unit under either an accretion or severance standard. Thus, the final determination cannot be made by summary judgment but requires the jury, requested by the Plaintiffs, to determine facts and weigh the various factors used to determine an appropriate bargaining unit.

III.ERRORS BY THE PANEL

A. Accretion vs. Severance

Given the language of 49 U.S.C. and case law, it was clear error by the Panel when it refused to analyze the TRAX employees claims through federal labor doctrines that are essential to protect employees' rights to be in an appropriate bargaining unit and choose their own representative. Panel Order at 13-14 n. 2. As stated by the Panel: "We doubt federal labor doctrine even applies here." "The National Labor Relations Act (NLRA) does not govern this dispute because state law and a state agency are involved, and accretion as well as severance are merely procedural tools used by the National Labor Relations Board to judge whether a bargaining unit satisfies the standards set forth in NLRA." *Id* at 13. The Panel threw out these critical doctrines without even having any Utah case law or statutory provisions that conflict with their application to this matter.

The accretion doctrine in particular has been found by the Tenth Circuit as an important tool to protect employees' rights. In *Borden v. NLRB,* 19 F.3d 502 (10th Cir. 1994), the Tenth Circuit refused to automatically accrete even though employees were represented by the same bargaining representative. This was the situation initially in the case at bar before the TRAX employees presented to UTA petitions with approximately 63% of the employees rejecting Amalgamated Transit Union Local 382 ("Local 382") as their bargaining representative.

For some inexplicable reason, the Panel found that a federal judge that had no definition under Utah state law of "appropriate bargaining unit" should ignore 70 plus years of federal labor law cases and doctrines defining "appropriate

bargaining unit" and just decide on a basis of his own creation. This occurred despite the Panel admitting that UMTA led to a provision in Utah state law that required UTA to negotiate with an appropriate bargaining unit. The Panel stated: "This provision was enacted in 1969 to comply with the requirements of federal law contained in UMTA and thereby ensure federal funding." Panel Order at 9.

Clearly, it is more logical to find that a provision enacted pursuant to federal law is consistent with the federal labor law that inspired it than to create out of whole cloth a standard that ignores federal doctrine without any state law supporting such a departure. In fact, had the Panel followed Tenth Circuit precedent and tried to apply state law to an issue of first impression it would have applied the established federal doctrines. *See Enfield v. A.B. Chance Co.*, 228 F.3d 1245 (10th Cir. 2000). While this at first seems contradictory, Utah case law cited to the Panel supports this view. Utah state law looks to federal law for guidance on state labor law issues. *Park City Ed. Assn. v. Bd. Ed. Park City School Dist.*, 879 P.2d 267, 272 (Utah Ct. App. 1994).

By ignoring the federal doctrines the Panel did not respect Utah law. Moreover, Appellants due process rights have been violated by creating a legal standard after a party has to respond to motion for summary judgment. How, can a party determine whether there is a dispute about material facts until he or she knows the legal standard that will create materiality?

Despite finding that the doctrines did not apply, the Panel attempted to justify the Trial Court's finding that the case was governed by a severance doctrine. The Panel first stated that the TRAX employees were too late to challenge accretion since they objected to their inclusion in the bargaining unit "nearly six years after the alleged accretion occurred." Panel

Order at 16. This is factually and legally inaccurate. Under *Gitano Group, Inc.* 308 NLRB 1172 (1992), when the TRAX facility opened in December of 1999, (one year after the 1998 contract) geographically separate from the bus facility, a new bargaining unit was created. The TRAX employees were not accreted at that point so they had no need to object; they were as a matter of law in a separate bargaining unit. Moreover, under *Gitano,* since the majority of the employees were from the old facility, by presumption the bargaining representative was Local 382. But, as stated above, Tenth Circuit case law does not find that two units represented by the same bargaining representative automatically create an accretion. *Borden v. NLRB, 19* F.3d 502 (10th Cir. 1994). The TRAX employees were informed by Local 382 that their issues would be addressed when the five-year contract signed with UTA expired in 2003. It was only when it became clear that the new contract would not address their issues, including seniority, pay differentials and safety issues did the TRAX employees act. They informed UTA of the fact that they no longer desired to be represented by Local 382. They were told that UTA considered them one unit and not two despite *Gitano. Id.*

The Panel's second reason also totally ignores *Gitano* and its progeny. *Id.* The Panel states: "Second, this case involves employees previously represented by the same bargaining unit. Accretion generally involves employees, whether new or transferred, that are added to an existing bargaining unit, not employees that are retained within the same bargaining unit." The first sentence, if not an error, demonstrates confusion between bargaining representative and bargaining unit. The bargaining unit is the voting district and the bargaining representative is the agent. As a matter of law, under *Gitano,* and *U.S. Tsubaki,* 331 N.L.R.B. 327 (2000) the transferred employees were in a new bargaining unit. Moreover, even if

they were existing employees the fact they were in new positions also prevented any accretion. *NLRB v. Superior Protection, Inc.* 401 F.3d 282, 287 (5th Cir. 2005).

The third reason given is also factually and legally inaccurate. "Third, the circumstances here do not resemble a typical accretion claim. Accretion involves a group being cast against its will into another group. That is simply not the case with light rail employees- the original bargaining agreement was first ratified by the bus employees, who benefitted from the provision allowing for transfer. And, the subsequent bargaining agreement was ratified by both bus and light rail employees." Panel Order at 16-17. The TRAX employees never ratified an agreement. They were not in existence until after the ratification of the first contract in 1998 and they voted against ratification of the second contract in 2004, not once but twice. (Attachment C-Affidavit of Lisa Burke ¶2), UTA and Local 382 are clearly trying to force them into the bus bargaining unit. The fact that they may have benefitted from a transfer has no legal significance since that fact applied in *Gitano* and its progeny without legal consequence.

Finally, the Panel asserts that the TRAX employees have to rebut the presumption that Local 382 represents the TRAX employees and has failed to do so. The Panel was presented with petitions from about 63% of the TRAX employees rejecting Local 382 which clearly rebuts that presumption. (Att. D)

B. Summary Judgment

The Panel found that summary judgment was appropriate by creating a test for appropriate bargaining units which has no basis in either federal or Utah state law. According to the Panel, summary judgment was appropriate because (1) the

majority of the employees had transferred from the bus unit; (2) there was an alleged stable relationship from 1999; (3) Local 382 had been a bargaining representative from 1904; (4) an industry practice was to consolidate workers into one bargaining unit.

The Panel has created its own test without Utah state or federal law support, meanwhile the Panel ignored an established test for an appropriate bargaining unit which would have justified a denial of summary judgment. The criteria are well established and used in both federal and state courts that commonly look for guidance about labor matters from the NLRB. As stated in *International Brotherhood of Electrical Workers v. Aubrey, Jr.*, 42 Ca. App. 4th 861 (Ct. App. 2nd Appellate Dist., Div. 4, 1996):

> The Criteria used to determine whether this should be done include the usual factors considered in making appropriate-unit determinations. Because no election will be held if an accretion is found; however, additional factors must first be considered: whether the new group of employees itself constitutes an appropriate unit, the size of the group to be accreted relative to the size of the existing unit; whether the group to be accreted was already in existence at the time the existing bargaining unit was recognized; the extent to which the existing unit is itself the result of accretions; and, of course the views of the employees.

Id. (citations omitted).

Baltimore Sun v. NLRB is useful for a list of twelve criteria used in the appropriate bargaining unit test. 257 F.3d 419, 429 (5th Cir. 2001). The test and the Appellants' response to summary judgment briefly demonstrating the

suitability of the TRAX only bargaining unit was provided to the Panel as an exhibit. (Append. 05-4222 at 137-38.) Despite this, the Panel believes that it can determine appropriate bargaining units with four criteria that they created. Of course, if the expanded list is used, summary judgment is clearly inappropriate. For example, almost 63% of the employees clearly wanted to remain in a separate unit. The approximately 150 TRAX employees are at a different location, the TRAX facility. (Append. 05-4222 at 110.) As stated in *Frontier Telephone of Rochester, Inc.* 344 NLRB No. 153 (July 29, 2005), if employees lack common day-to-day supervision an accretion is rarely allowed. *Id. The* TRAX employees lack common daily supervision. (Append. 05-4222 at 110).

Taken together, the factors pointed to the inappropriateness of allowing accretion. This should have prevented summary judgment since a reasonable fact finder could find a separate bargaining unit. The fact finder would have been a jury since the TRAX employees requested a jury trial on this matter. The summary judgment response filed at the Trial Court contained other factual disputes preventing summary judgment, had the proper standard been applied.

Similarly, there is clearly a dispute about whether, for severance purposes, the TRAX employees ever had a history of bargaining together with bus employees since no contract has ever been approved by the TRAX employees. Moreover, Local 382 was rejected by the TRAX employees prior to any ratification of a contract. The determination of an appropriate bargaining unit is clearly a factually dependent and balancing endeavor not amendable to summary judgment but is the role of a jury. This fact alone should have prevented the granting of summary judgment. The severance test used by the Panel is incomplete; a complete list would include: chance to obtain

separate representation (no chance), the present relationship works (irreconcilable differences between bus and rail employees), whether they are in distinct departments (separate facilities) *Mallinckrodt Chem. Works,* 162 N.L.R.B. 387, 397 (1966). Appellants filed affidavits in opposition to summary judgment on these points which were ignored by the Panel.

C. Denial of Rule 56(f) Motion

The TRAX employees had no opportunity to conduct discovery. The Panel states that the TRAX employees have not identified with specificity any facts that would preclude summary judgment. However, the Panel admits that "Appellants argue that discovery is necessary as to whether Local 382 enjoys majority support." However, they find it of marginal utility since "UTA employees ratified both the 1999 (sic) and 2004 collective bargaining agreements, additional discovery would be of marginal utility." Panel Order at 21. The passing of a contract does not translate into majority support for the bargaining representative. A contract may be passed due to a belief that it is the best the bargaining representative will negotiate, not that the employees support the bargaining representative. More importantly, Utah law requires majority support by members of the bargaining unit, not majority support by the union members who are the only ones authorized to vote on the contract. Consequently, as explained in the 56(f) affidavit (Att. E), UTA and Local 382 are asserting system-wide support without verification and thus discovery might establish that they lack such support and on information and belief the plaintiffs assert that they lack a majority. Lacking such support, the system-wide bargaining unit would not be legal under Utah Code ANN. § 17A-2-1031 (2004). Thus, only the TRAX employees would have majority support in an appropriate bargaining unit. The Panel also states that UTA and Local 382 have engaged in good faith

negotiations. Panel Order at 12. But just how good faith can they be if the Plaintiffs discover, as is requested in paragraph 8 of the 56(f) affidavit, that the union president received special benefits from UTA with an acceptable inference that the benefits were given to assure a favorable contract for the company? The affidavit also requests discovery on first amendment claims that were not even discussed in the Panel's decision.

D. Granting of Dismissal to the United States Department of Labor

The TRAX employees, in their complaint, alleged that the DOL certified inadequate protective arrangements. The Trial Court admitted that "agency certification decisions under 49 U.S.C. §5333(b) are amenable to judicial review." This is clearly correct. *Amalgamated Transit Union Intl' v. Donovan,* 767 F.2d 939, 948 (D.C. Cir. 1985). However, the Trial Court granted dismissal and the Panel affirmed based on the fact that: "Plaintiffs have failed to plead or otherwise allege that the agency had any knowledge or information regarding the current labor dispute when it made the challenged certification decision in October 21, 2001 ." Thus, the TRAX employees were precluded from challenging the certification unless they allege that the DOL knew about the 2004 labor dispute in 2001.

Both the Trial Court and Panel made their decisions about the agency action without having the administrative record before them contrary to *Franklin Savings Corp. v. Director Office of Thrift Supervision, 934* F.2d 1127, 1142 (10th Cir. 1991). The Plaintiffs' claim was that the agency failed to consider the need to have a mechanism for unit clarification prior to the dispute. Thus, the Panel's order is illogical and not supported by case law. It is the agency's responsibility to

consider all the statutory requirements. *Citizens to Preserve Overton Park, Inc. V. Volpe,* 401 U.S. 402, 419-20 (1971). There is no requirement in the Tenth Circuit or any other federal jurisprudence that the plaintiffs must have pointed out the deficiency to the agency prior to bringing suit. The plaintiffs cannot know whether the deficiency had been identified by others prior to having a chance to review the whole record. The agency had an affirmative duty to try to anticipate the problem. *Thompson v. HUD,* 348 F. Supp. 2d 398, 457-59 (D. Md. 2005). While after reviewing the record, the failure to consider the problem might not be arbitrary and capricious, that determination cannot be made prior to obtaining and reviewing the whole record. Arguably, Utah state law which has no provisions for unit clarification or decertification does not protect the bargaining rights of the Plaintiffs. Blue collar workers should simply not have to engage in expensive litigation to get the most basic bargaining right; the right to an agent of his or her own choosing. As stated by the United States Supreme Court:

> The House Report recognized that 'no one, whether employer or employee need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust.

Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 705, 75 L. Ed. 2d 387, 103 S. Ct. 1467 (1983.) (Quoting H.R. Rep. No. 245, 80th Cong., 1st. Sess., 17 (1947) (emphasis in original). The Panel's decision, if allowed to stand, does not recognize that right under UMTA.

E. Motion to Amend

The TRAX employees filed a Motion to Amend on August 14, 2005 prior to dismissal of the case. Included in the

amended complaint was a new complaint against the DOL for recertifying the protective arrangements during the summer of 2005. This clearly occurred after the DOL had knowledge of the labor dispute. The entire case was dismissed on August 15, 2006. The Plaintiffs did not appeal the dismissal until August 22, 2006. The Plaintiffs took the Trial Court on its word that the entire case had been dismissed, thus the Plaintiffs were denied the ability to amend their complaint without an order by the Tenth Circuit Appeals Court. The Panel should have remanded for such a determination since "it is an abuse of discretion to deny a request without expressing a justification. *T.V. Communications Network v. Turner Network,* 964 F.2d 1022, 1028 (10th Cir. 1992).

It is also illuminating how the Panel treated a related issue. The order issued by the Trial Court judge did not address the dismissal of the state claims of Defendant Local 382. This occurred despite two requests from the Plaintiffs that the issue be addressed if a dismissal of the federal defendants should occur. However, the Panel found that the claim was dismissed despite the Trial Court' s silence. Panel Order at 19 n.3. Yet the Panel did not find that the Motion to Amend had been dismissed on August 15, 2006 despite the Plaintiffs' complaint that it had to treat the Motion to Amend as being dismissed because multiple requests from the Plaintiffs had been silently denied on other issues and thus it took the action of filing an appeal to expedite the review of the case. Numerous other requests by Plaintiffs had been silently denied as explained in Plaintiffs' Tenth Circuit reply brief for 05-4222.

CONCLUSION

Appellants request an en banc review of the Panel's decision. The Panel has granted dispositive relief to the

Defendants under standards that are not supported by law or fact. Because of these decisions, the Appellants, blue collar workers, are being denied their right to be represented by an agent that will protect their interests. This issue is of national importance due to the thousands of similarly situated individuals who are not being properly protected by the United States Department of Labor. The decision also creates an implicit conflict with the District of Columbia Circuit Court over the role of federal labor law.

Dated this 15 day of September, 2006.

/s/
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No. 06-1050

In The
Supreme Court of the United States

LISA BURKE, MICHAEL CARPER, Individually and on Behalf of All Others Similarly Situated,

Petitioners,

v.

UTAH TRANSIT AUTHORITY, JOHN INGLISH, Individually, LOCAL 382 OF THE AMALGAMATED TRANSIT UNION and the UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION OF RESPONDENT LOCAL 382 OF THE AMALGAMATED TRANSIT UNION

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	2
Statement Of The Case	3
Reasons Why The Petition Should Be Denied	4
I. The Decision Of United States Court Of Appeals For The Tenth Circuit Does Not Conflict With Decisions Of Other Courts Of Appeals	4
A. The decision in this case is consistent with *Donovan*	5
1. *Donovan* does not support claim against DOL	5
2. *Donovan* does not require the use of federal law to interpret Utah law	6
B. The decision in this case is consistent with *Garland*	9
II. The District Court Appropriately Granted Summary Judgment	11
A. The District Court did not shift the burden of proof	12
B. Petitioners had sufficient time to conduct necessary discovery	12
Conclusion	14

TABLE OF AUTHORITIES

Page

CASES

Amalgamated Transit Union v. Donovan, 767 F.2d 939 (D.C. Cir. 1985) 4, 5, 6, 7, 9

Burke v. Utah Transit Authority, 462 F.3d 1253 (10th Cir. 2006) 1, 8, 9

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 13

Delta Airlines, Inc. v. August, 450 U.S. 346 (1981) 10

Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union, 457 U.S. 15 (1982) 6

Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983) 10, 11

Texas State Teachers Assn. v. Garland Independent School Dist., 777 F.2d 1046 (5th Cir. 1985) 4, 9, 10, 11

STATUTES

28 U.S.C. § 1254(1) 1

National Labor Relations Act, 29 U.S.C. § 151 et seq. 5

Section 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 5333(b)Section 13(c) 2

Utah Code Annotated § 17A-2-1031 ..... 2, 5

RULES

Rule 56(f), Federal Rules of Civil Procedure 13

BRIEF IN OPPOSITION OF RESPONDENT LOCAL 382 OF THE AMALGAMATED TRANSIT UNION

The Respondent Local 382 of the Amalgamated Transit Union ("Local 382") respectfully requests this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals of the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported as *Burke v. Utah Transit Authority,* 462 F.3d 1253 (10th Cir. 2006). The order denying the timely petition for rehearing en banc is reprinted in the appendix to the petition as Appendix A, pp. 1a-2a. The orders of the trial court of the United States Court for the District of Utah (District Judge Paul G. Cassell) were not reported. They are reprinted in the appendix to the petition as Appendices C, D, and G, pp. 24a-39a, 44a-53a.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on September 1, 2006 affirming the decision of the lower court. The court of appeals denied a timely petition for rehearing en banc on November 6, 2006. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 5333(b), provides, in pertinent part, as follows:

> (1) As a condition of financial assistance . . . , the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable . . .
>
> (2) Arrangements . . . shall include provisions that may be necessary for –
>
> (A) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;
>
> (B) the continuation of collective bargaining rights;
>
> (C) the protection of individual employees against a worsening of their positions related to employment . . .

Utah Code Ann. § 17A-2-1031 provides as follows:

> Employees of any public transit system established and operated by the district shall have the right to self-organization, to form, join, or assist labor organizations and to bargain collectively through representatives of their own choosing provided, however, that such employees and labor organizations shall not have the right to join in any strike against such public transit system. The district shall recognize and bargain exclusively with any labor organization representing a majority of its employees in an appropriate unit with respect to wages, salaries, hours, working

conditions, and welfare and pension and retirement provisions, and, upon reaching agreement with such labor organization, to enter into and execute a written contract incorporating therein the agreements so reached.

STATEMENT OF THE CASE

Local 382 incorporates the description of the facts and history of this case as set forth in the opinion of the Court of Appeals for the Tenth Circuit. Local 382 desires to correct the following possible misstatements contained in the petition.

1. Although the initial complaint in this case was titled as a "class action", the Petitioners never sought nor received class certification from the trial court or the court of appeals. The Petitioners only represent themselves in this case.

2. Throughout this case, the Petitioners have referred to Local 382 as a "company union" or a "union endorsed" by Respondent Utah Transit Authority ("UTA"). Except for the unsubstantiated assertions of the Petitioners, there is no evidence in the record to support such characterizations of Local 382.

3. In the petition, it is alleged that Local 382 argued that "the NLRA does not protect individual rights". Local 382 never made such an argument. In fact, Local 382 argued that the NLRA "is to maximize collective rights of the employees but [also] to give due deference to individuals . . . "

4. In the petition, it is stated that the court of appeals ignored "the First Amendment issues despite being fully briefed". As will be discussed below, these issues were not briefed on appeal.

REASONS WHY THE PETITION SHOULD BE DENIED

The petition should be denied because it is not of sufficient import to warrant further consideration. A unanimous panel of the court of appeals gave full consideration to the issues and decided them correctly. The decision of the Court of Appeal for the Tenth Circuit does not conflict with decisions of other circuit courts of appeal. Further, the decision correctly applied federal court procedural rules.

I. THE DECISION OF UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

The petition highlights two decisions which Petitioners allege conflict with the rulings in this case. First is *Amalgamated Transit Union v. Donovan*, 767 F.2d 939 (D.C. Cir. 1985). The *Donovan* case involves the interpretation of Section 13(c) of the Urban Mass Transit Act. Second is *Texas State Teachers Assn. v. Garland Independent School Dist.*, 777 F.2d 1046 (5th Cir. 1985). The *Garland* case involved the First Amendment rights of public school teachers to communicate at school with other teachers regarding union issues. These two cases are discussed separately below.

A. The decision in this case is consistent with *Donovan*.

The Petitioners rely upon the *Donovan* case for two separate, but related, legal propositions. First, the Petitioners assert that *Donovan* substantiates their direct legal challenge to the certification of the labor arrangements between Local 382 and the UTA, under Section 13(c) of the Urban Mass Transportation Act ("UMTA"), to be fair and equitable, by the Respondent United States Department of Labor ("DOL"). Second, the Petitioners argue that *Donovan* requires that federal law, as articulated in the National Labor Relations Act, 29 U.S.C. § 151 et seq. ("NLRA"), and as refined by decisions of the National Labor Relations Board and federal courts, must be used when interpreting the phase "an appropriate unit" as codified in Utah law. The Utah law is quoted above and is found at Utah Code Ann. § 17A-2-1031. As will be discussed separately below, the Petitioners have misinterpreted *Donovan*.

1. *Donovan* does not support the claim against DOL.

The Petitioners appropriately assert that *Donovan* held that, should the DOL incorrectly certify a labor arrangement under Section 13(c) of the UMTA as fair and equitable, then that certification can be challenged in federal court. In this case, the court of appeals, however, rightly held that, based upon the entire record and the law, the certification by the DOL, which occurred in October, 2001, was correct. The only rationale advanced by Petitioners, that the DOL certification was incorrect, is that the system-wide bargaining unit with the UTA is an inappropriate unit as a matter of law. This argument has

been the gravamen of Petitioners' case from the start. Every time this argument has been made to the courts, the courts have correctly rejected it. As will be discussed below, this Court should also reject this argument by denying this petition for writ of certiorari.

2. *Donovan* does not require the use of federal law to interpret Utah law.

The *Donovan* case and this Court's opinion in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union,* 457 U.S. 15 (1982), are the seminal case interpreting the relationship between Section 13(c) of the UMTA and state labor law for its public transit employees. Nothing in the *Burke* opinion conflicts with *Donovan.* In fact, the *Burke* opinion honors *Donovan.*

One of the most significant statements contained in *Donovan* is as follows:

> In sum, Congress struck a delicate balance in section 13(c). The statute provides that state law should govern the labor relations of public transit authorities and their employees, but it conditions federal transit aid, in part, on the continuation of collective bargaining rights. In setting out those rights, Congress chose not to incorporate the entire structure and requirements of the NLRA into section 13(c), for to do so would force states to choose between federal transit aid and their exclusion from the coverage of the NLRA. On the other hand, Congress made it clear that federal labor policy would dictate the substantive meaning of collective bargaining for purposes of section 13(c). "Good faith" bargaining, to a point of impasse if necessary, over wages, hours and other terms and conditions of

> employment has always been the essence of federally-defined collective bargaining rights; indeed, excluding the federal sector, it is the almost universally recognized definition of collective bargaining in the United States.

767 F.2d 938, 950-951.

The *Burke* court, in the insightful footnote 2, refers to the above quoted statement with the following:

> We doubt federal labor doctrine even applies here. The National Labor Relations Act (NLRA) does not govern this dispute because state law and a state agency are involved, and accretion as well as severance are merely procedural tools used by the National Labor Relations Board to judge whether a bargaining unit satisfies the standards set forth in NLRA. *See* 29 U.S.C. § 152(2); Utah Code Ann. § 34-20-2(5); *see also Jackson Transit Auth.*, 457 U.S. at 27-29 (noting that § 13(c) does not supercede state law and leaves intact the exclusion of local government employers from NLRA); *see generally* Robert A. Gorman & Matthew W. Finkin, *Labor Law* § 5.2 (2d ed. 2004). While Congress clearly intended "that federal labor policy would dictate the substantive meaning of collective bargaining for purposes of [UMTA]," *Donovan*, 767 F.2d at 950, it "did not intend to subject local government employers to the precise structures of the NLRA." Id. at 949. To the contrary, Congress made a reasoned decision to incorporate only the most fundamental substantive tenets of federal labor policy.
>
> Consequently, we are skeptical of analyzing the plain language of § 17A-2-1031 through this framework. Neither the plain language of the

> statute requires it, nor does the legislative intent behind the statute suggest it. Section 17A-2-1031 was enacted to meet the requirements of UMTA and to ensure the receipt of federal aid for Utah's public transportation system. If UMTA does not require analysis of these doctrines, then neither should § 17A-2-1031.

462 F.3d 1253, 1260.

The court of appeals clearly recognized that Utah law is result oriented. Utah does not have a sophisticated system of governance of public employee labor relations. Utah has no "little labor relations board" as exists in some states such as California and New York. Under our federal system, as codified in Section 13(c) of the UMTA, it is the right of the State of Utah to adopt the simple, results oriented labor policy for its transit employees as articulated in Section 17A-2-1031, Utah Code Annotated, so long as that policy does not violate "the most fundamental substantial tenets of federal labor policy".

The Petitioners have been unable to point to anything that would substantiate that a system-wide bargaining unit at a public transit company violates federal labor policy, let alone the most fundamental substantial tenets of federal labor policy. The Petitioners' arguments have always centered upon a misinterpretation of the doctrines of accretion and severance as developed by the National Labor Relations Board and federal courts under the NLRA. Even though, as pointed out in the above quoted footnote 2, the district court and the court of appeals were not obligated by federal law or state law to utilize a NLRA framework to interpret the phase "an appropriate unit" as found in Utah statute, both courts did engage in such an analysis.

The court of appeals carefully reviewed the district court's analysis of the federal labor law doctrines of accretion and severance and held, in part, as follows:

> These factors and the undisputed facts clearly support the district court's grant of summary judgment. The majority of TRAX employees, including the appellants [Petitioners], transferred from the bus unit. An "established stable bargaining relationship" has existed between Local 382 and the consolidated unit since 1999. Local 382 has been the bargaining representative for UTA and its predecessors and, consequently has represented all mass transit workers in Utah, since 1904. Finally, industry practice is to consolidate mass transit employees into a single bargaining unit.

462 F.3d 1253, 1262.

With their argument, the Petitioners advance a misinterpretation of federal labor law and then attempt to impose that misinterpretation upon Utah labor law. As the *Burke* opinion correctly held, *Donovan* does not support Petitioners' conclusion.

B. The decision in this case is consistent with *Garland*.

With this petition for writ of certiorari, it is argued for the first time on appeal that the Petitioners' First Amendment free speech rights were violated by the UTA. As a basis for this argument, the Petitioners cite to the *Garland* case, a decision which was never cited by any party to this case until this petition, despite the fact that the *Garland* opinion was rendered by the Court of Appeals for the Fifth Circuit in 1985.

Before the district court, the Petitioners aggressively argued that their First Amendment rights have been violated by the UTA. This Court's decision in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), was argued by the parties and cited by the district court as a reason why the Petitioners' rights had not been violated. On appeal to the court of appeals, the Petitioners filed two docketing statements, two opening briefs, three reply briefs, and a petition for rehearing. In not a single one of these documents did the Petitioners mention *Perry* or *Garland*. Additionally, in those eight documents, there were only brief, single sentence references to Petitioners' First Amendment rights being violated.

This Court will not review issues on writ of certiorari which were not raised in the court of appeals. *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981). A review of the filings before the court of appeals in this matter demonstrate that any First Amendment issues raised by the *Perry* case and the *Garland* case were not brought to the attention of the court of appeals.

Even though the issues involving the First Amendment were neither briefed nor argued before the court of appeals, that court's decision was perfectly consistent with the *Garland* opinion. In *Garland*, a teachers union brought suit against a school district claiming that the district's policies, which restricted communication between teachers regarding "employee organizations", violated the First Amendment rights of the teachers. The court of appeals held, because of the guidelines established by this court in *Perry*, that the union's First Amendment rights were not violated by the district policies, but that the policies which deny "teachers the right to discuss . . .

[Union or Union] business during non-class time are unconstitutional". 777 F.2d 1046, 1055.

There is no competent evidence in the record that the Petitioners were denied, by any policy of the UTA, the right to discuss and communicate with other employees of the UTA matters involving employment, union or anti-union views on non-UTA time. The only evidence present was that the Petitioners were prevented from posting notices on a bulletin board on UTA property which had been expressly reserved for the use of Local 382, pursuant to a collective bargaining agreement between the UTA and the Local. This is the very subject discussed by this Court in *Perry*.

Had the Petitioners raised the *Garland* opinion with their appeal, the Court of Appeals for the Tenth Circuit would have held, consistent with *Perry* and *Garland,* that Petitioner's First Amendment rights had not been violated.

II. THE DISTRICT COURT APPROPRIATELY GRANTED SUMMARY JUDGMENT

With both their appeal and this petition for writ of certiorari, the Petitioners have argued that the district court inappropriately granted the UTA's motion for summary judgment. In the petition, two central themes are advanced in support of Petitioner's argument. First, they argue that the burden of proof in this case was improperly shifted by the district court to the Petitioners in the granting of the summary judgment. Second, the Petitioners claim that they have not had sufficient time to conduct discovery prior to the district court hearing the UTA's

motion for summary judgment. These two points will be addressed separately below.

A. The District Court did not shift the burden of proof.

Under the Utah law quoted above, it is the Petitioners' burden to prove that the system-wide bargaining unit between the UTA and Local 382 is inappropriate. The Petitioners have attempted to shift the burden of proof to the Respondents requiring the Respondents to prove that the bargaining unit was appropriate. As demonstrated above, the Petitioners' argument fails for two reasons. First, it incorrectly assumes that federal labor law applies to the Utah statute. Second, the Petitioners fail to correctly articulate the federal labor law doctrines of accretion and severance.

The record in this case is filled with undisputed material facts, which taken together, support the correct legal conclusions that, under Utah law, the system-wide bargaining unit between UTA and Local 382 is appropriate. The Petitioners have been unable to point, either before the district court, the court of appeals, or this court, to a single disputed material fact which would support the conclusion that the system-wide bargaining unit is inappropriate.

B. Petitioners had sufficient time to conduct necessary discovery.

During the prosecution of this case, when the district court was scheduling matters, the Petitioners did not raise any objections that they did not have sufficient time to conduct discovery. It was not until after the Petitioners

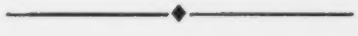
filed a motion for preliminary injunction, filed a second motion for preliminary injunction, responded to a motion to dismiss, and filed their own motion for partial summary judgment, that the Petitioners alleged they needed more time to conduct discovery. The Petitioners made the request by filing a Rule 56(f) motion.

The court of appeals correctly ruled that the district court did not abuse its discretion by denying the Petitioners' Rule 56(f) motion because the three "disputed" issues of fact highlighted by Petitioners in their motion were not material as to whether or not the system-wide bargaining unit between the UTA and Local 382 was appropriate under Utah law. This court, in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), made the following observation:

> . . . no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

477 U.S. 317, 326. This observation could apply to the case at hand. The Petitioners choose not to conduct discovery; instead they choose to proceed immediately with motions. When given the opportunity to explain why additional discovery would be necessary, the Petitioners could not point to any disputed issues of material fact.

The district court correctly granted the UTA's motion for summary judgment.



CONCLUSION

For the foregoing reasons, Respondent Local 382 of the Amalgamated Transit Union requests this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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No. 06-1050

In The

Supreme Court of the United States

LISA BURKE, MICHAEL CARPER, ET AL.,

Petitioners,

v.

UTAH TRANSIT AUTHORITY, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

SUMMARY OF REASONS TO DENY THE PETITION 1

STATEMENT OF THE CASE 3

A. Statement of Facts 3

B. Proceedings Below 7

REASONS FOR DENYING THE PETITION 10

I. PETITIONERS' ARGUMENT REGARDING THE APPROPRIATENESS OF THE BARGAINING UNIT WAS NOT PROPERLY PRESENTED TO THE LOWER COURTS, DOES NOT PRESENT A QUESTION OF FEDERAL LAW, AND WAS CORRECTLY DECIDED 11

A. The Tenth Circuit Decision Creates No Circuit Split 12

B. Petitioners Never Properly Presented The 12-Factor Test They Claim The Lower Courts Were Required To Consider 14

C. The Tenth Circuit Decision Affirmed The District Court's Decision And Also Correctly Determined That The Bargaining Unit Is Appropriate 15

TABLE OF CONTENTS – Continued

Page

1. Petitioners received proper notice of the factors the lower courts relied on to decide the appropriateness of the bargaining unit 16

2. The Tenth Circuit decision does not conflict with the Third Circuit decision in *Paper Manufacturers* 17

3. Petitioners have an adequate remedy under state law 19

II. THE COURT SHOULD NOT CONSIDER PETITIONERS' THIRD QUESTION PRESENTED REGARDING THEIR FREE SPEECH CLAIM 20

A. Petitioners' Argument That The District Court Misapplied The Law In Dismissing Their Free Speech Claim Was Waived Because It Was Not Made To The Court Of Appeals 20

1. Petitioners Did Not Raise the Argument that the District Court's Application of *Perry* was Wrong 20

2. Petitioners Did Not Raise the Argument that the District Court Improperly Found that Their Speech was Not on a Matter of Public Concern 21

B. There Is No Split Of Authority Between The Circuits For The Court To Resolve Because The Tenth Circuit's Opinion In This Case Is Not Contrary To The Fifth Circuit's *Garland* Decision Or The Decision Of Any Other Court 21

TABLE OF CONTENTS – Continued

Page

C. In Any Event, The District Court Did Not Misapply The Law 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Amalgamated Transit Union International v. Donovan, 767 F.2d 939 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986) 12, 13, 15

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)..... 15

Baltimore Sun Co. v. N.L.R.B., 257 F.3d 419 (4th Cir. 2001)..... 14

Carey v. Westinghouse Electric Corp., 375 U.S. 261 (1964)..... 17

Connick v. Meyers, 461 U.S. 138 (1983)..... 21, 24

Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981)..... 20

Jackson Transit Authority v. Local Div. 1285, Amalgamated Transit Union, 457 U.S. 15 (1982) 9, 19

King v. Downing, 58 Fed. Appx. 830 (10th Cir. 2003)..... 24

Kroger Co., 219 N.L.R.B. 388 (1975)..... 18

Moore v. City of Wynnewood, 57 F.3d 924 (10th Cir. 1995)..... 24

N.L.R.B. v. Paper Manufacturers Co., 786 F.2d 163 (3rd Cir. 1986) 17, 18

Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983)..... 2, 20, 21, 22, 23

State Farm Fire & Cas. Co. v. Mhoon, 31 F.3d 979 (10th Cir. 1994) 20

Texas State Teachers Ass'n v. Garland Ind. School District, 777 F.2d 1046 (5th Cir. 1985).... 20, 21, 22, 23, 24

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969)..... 24

TABLE OF AUTHORITIES – Continued

Page

STATUTES

49 U.S.C. § 5333(b) 2, 6, 12

Utah Code Ann. § 17A-2-1031 ..... 1, 2, 7, 8, 19

OTHER AUTHORITIES

1 Patrick Hardin & John E. Higgins, Jr., The Developing Labor Law, 1257-58 (4th ed. 2001) 18

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BRIEF IN OPPOSITION

Respondents Utah Transit Authority and John Inglish (together, "UTA") file this Response in Opposition to Petitioners Lisa Burke and Michael Carper's ("Petitioners") petition for writ of certiorari ("Petition") to the Tenth Circuit Court of Appeals.

SUMMARY OF REASONS TO DENY THE PETITION

The Petition should be denied for several reasons. First, Petitioners failed to properly raise these issues before the lower courts. Petitioners presented no evidence in support of their claim that the existing system-wide bargaining unit at UTA was not "appropriate" in violation of Utah Code § 17A-2-1031. Although Petitioners argued that determination of the appropriateness of a bargaining unit is an inherently factual question, they never presented any evidence and therefore never created a genuine dispute of material fact on that issue. Thus, the Tenth Circuit did not address Petitioners' 12-factor "test" for determining the appropriateness of a bargaining unit and did not state any position, let alone one that conflicts with other circuit court decisions. Petitioners also failed to preserve their free speech arguments because they did not make their arguments to the Tenth Circuit. Those arguments were therefore waived.

Second, Petitioners have failed to demonstrate any kind of a circuit split. Petitioners claim that the lower courts had a duty to apply federal standards in determining whether the existing bargaining unit was appropriate. The law is clear, however, that state labor laws apply, although

the substantive content of those state labor laws must be consistent with federal labor policy. Furthermore, the Tenth Circuit expressly stated this principle and followed it.

Petitioners have also failed to demonstrate a circuit split relating to their free speech claim. Indeed, there could not have been a circuit split because Petitioners never made the arguments advanced in their Petition to this Court to the Tenth Circuit and that court therefore never resolved them. The Tenth Circuit decision does not even mention any First Amendment claim and stated no position. Accordingly, there is no conflict between the Tenth Circuit decision in this case and the cases cited by Petitioners.

Finally, the Petition should not be granted because each of the proposed "questions presented" relating to UTA were correctly decided by the lower courts. The Tenth Circuit correctly determined, based on this Court's precedents, that there is no claim against UTA for a violation of Section 13(c) of the Urban Mass Transportation Act (49 U.S.C. § 5333(b)); only for breach of the 13(c) agreement, which was never alleged in Petitioners' complaint. The Tenth Circuit was also correct in holding, based on undisputed evidence, that the existing bargaining unit was appropriate, and that UTA therefore did not violate Utah Code § 17A-2-1031 in recognizing and bargaining exclusively with Local 382, the existing bargaining representative. Similarly, the district court correctly determined that Petitioners' First Amendment claim was without merit based on this Court's decision in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

A. Statement of Facts.

The Utah Transit Authority ("UTA") is a political subdivision of the State of Utah. It was established in 1969 to purchase the assets of private transit companies operating in the Salt Lake City metropolitan area and to provide a public transit service. For many years, UTA provided mass transportation services primarily through the use of buses. However, in 1999, UTA commenced light rail, or "TRAX," operations. Petitioners are currently employed by UTA as TRAX operators (drivers). Aplt. App. at 73.

Amalgamated Transit Union Local 382 ("Local 382") was recognized as the exclusive collective bargaining representative for UTA's operations, maintenance, and parts employees in 1904. Since then, it has continuously represented bargaining unit employees at UTA, always in a single, system-wide bargaining unit. In the early years of the twentieth century, Local 382 represented streetcar employees, as gasoline powered buses were not yet in existence. In the 1940s, streetcars were phased out and buses were substituted. During this period, Local 382 represented both bus employees and streetcar employees. After streetcars were phased out, Local 382 represented only bus employees until UTA commenced TRAX operations in 1999. Aplt. App. at 73, 112-14.

In 1995, as UTA planned to implement TRAX operations, UTA and Local 382 (in its capacity as bargaining representative of UTA's operations, maintenance and parts employees) negotiated the issue of whether the new TRAX jobs would be considered union or non-union work. At the conclusion of those negotiations, UTA and Local 382

agreed essentially that Local 382 would have the power and authority to bargain for positions performing work in the TRAX unit that was *comparable* to work performed by bargaining unit employees in bus units, *i.e.*, operations, parts and maintenance. Aplt. App. at 73-74, 113-14.

This initial agreement was followed in July 1998 by a subsequent agreement that, among other things, TRAX employees would be drawn from UTA's existing bus units and that bus employees transferring into the TRAX business unit would retain the same seniority they had accumulated as bus employees. Thus, seniority would be tracked on a system-wide basis (within the categories of operations, parts, and maintenance), not separately for TRAX and bus employees. Aplt. App. at 73-74, 113-14. This agreement on transfer and seniority was then included in the parties' 1998 collective bargaining agreement ("1998 Labor Contract"), which was duly ratified by Local 382's membership. Aplt. App. at 73-74, 113-14, 125-26. The 1998 Labor Contract also recognized Local 382 as the exclusive representative of employees covered by the contract, including TRAX employees.

The effect of these agreements was to set aside the new TRAX jobs for existing UTA employees who were members of the system-wide bargaining unit represented by Local 382. Petitioners were members of that system-wide bargaining unit and were beneficiaries of these agreements.

Pursuant to the transfer and seniority provisions set out in the 1998 Labor Contract, Petitioners transferred into the TRAX unit in late 1999 and early 2000, along with numerous other UTA employees, as TRAX operations were getting under way. Aplt. App. at 125. During that initial

time period, and on regular occasions thereafter, additional operations, parts and maintenance employees transferred from UTA bus units to the TRAX unit. The initial complement of employees was entirely made up of employees from the bus division. UTA now has employees who were hired directly into TRAX, but they were not hired until later. Aplt. App. at 113-14, 126.

In August 2003, after several years of work under the 1998 Labor Contract, UTA and Local 382 began negotiating a new collective bargaining agreement. The negotiations resulted in a tentative agreement in May 2004, but it failed to win ratification from employees. Aplt. App. at 127. On July 27, 2004, after further negotiations, UTA and Local 382 signed a second tentative agreement. Thereafter, it was distributed to employees in preparation for a vote on ratification. Aplt. App. at 127.

On August 5, 2004, a few days before a vote on ratification, Petitioners submitted to UTA management a petition from TRAX operators demanding a separate union. UTA had not previously received any formal objection to the existing bargaining unit. Aplt. App. at 153-54. Because UTA had already agreed with Local 382 to recognize it as the representative of the majority of employees in the system-wide bargaining unit, and was therefore obligated to bargain with it exclusively, it disregarded the petition.

On August 10, 2004, UTA employees ratified the collective bargaining agreement effective as of December 11, 2003 ("2003 Labor Contract"). Aplt. App. at 127. The 2003 Labor Contract states that UTA "recognizes the Union [Local 382] as the sole and exclusive collective

bargaining agent for all bus and TRAX operators . . . , parts and maintenance employees" of UTA. Aplee. Supp. App. at 132. The 2003 Labor Contract also maintained the same language regarding transfer of employees into the TRAX unit and seniority. However, it also included a side letter agreement that established a task team to study the seniority issue. Aplt. App. at 75, Aplee. Supp. at 245.

The vast majority of transit authorities across the United States that provide both bus and light rail operations include bus and rail employees in the same collective bargaining unit and represented by the same union. Aplt. App. at 13, 100-11, 116-23, 127-28.

As a condition to UTA's receipt of funding from the Federal Transit Administration, UTA is required to enter into an agreement with employee representatives pursuant to Section 13(c) of the Urban Mass Transportation Act ("UMTA") (codified at 49 U.S.C. § 5333(b)) ("Section 13(c)") that contains labor protective conditions. These protective conditions have been applied to all federal capital funding received by UTA pursuant to the Federal Transit Act since 1993. Aplt. App. at 128; Aplee. Supp. App. at 261-66. The 1998 and 2004 Labor Contracts are both agreements for purposes of Section 13(c), and both have been certified by the Department of Labor as sufficiently protective of labor conditions to comply with Section 13(c)'s requirements.

Petitioners' ultimate goals, as stated in their complaint, are to secure a change in the existing seniority rules so that bus operators cannot "bump" into the TRAX seniority roster, Aplt. App. at 13, and to get higher pay. *Id.* at 14.

B. Proceedings Below.

On October 22, 2004, Petitioners filed this action in the district court, alleging several claims arising out of UTA's refusal to recognize and bargain with a separate collective bargaining unit for the TRAX operators. Petitioners alleged that UTA and John Inglish (UTA's managing director) violated Section 13(c) and Utah Code § 17A-2-1031 ("Section 1031"), a statute that specifically sets out the collective bargaining rights of transit employees under Utah law. Petitioners also alleged that UTA violated Petitioners' First Amendment rights of free speech and free association by refusing Petitioners' request for access to bulletin boards similar to the access accorded to Local 382. Petitioners also alleged a claim of breach of fiduciary duty against Local 382 and a claim against the Department of Labor ("DOL") for improperly certifying UTA's Section 13(c) agreement as sufficiently protective of employee rights.

On November 29, 2004, Petitioners filed a motion for preliminary injunction in which they sought to bar UTA from (1) transferring bus employees to the TRAX division; and (2) allowing such transferred employees to have system-wide seniority. Petitioners also asked the district court to order UTA to allow them to post information on UTA bulletin boards regarding their efforts to organize a separate bargaining unit. The motion for preliminary injunction was heard on January 24, 2005 and subsequently denied by order dated January 25, 2005 (despite the denial, UTA allowed Petitioners to post information on a UTA bulletin board). Petitioners did not appeal this denial.

On January 31, 2005, less than a week later, Petitioners filed another motion styled as a motion for preliminary injunction, this time seeking an order barring UTA from

continuing to recognize Local 382 as bargaining representative for TRAX employees. The stated basis for the second motion was that the district court's "previous order was manifest error because it applied the wrong legal standard to the facts." Aplt. App. (Case 05-4079) at 191. This motion, effectively a motion for reconsideration, was heard on April 9, 2005 and denied orally in court. Aplt. App. (Case 05-4079) at 317; Exhibit A hereto (transcript).

On December 22, 2004, the DOL moved to dismiss the cause of action against it on grounds that no objection regarding the bargaining unit was asserted when the DOL approved UTA's Section 13(c) agreement in 2001. The district court granted this motion by order dated April 6, 2005.

On March 25, 2005, UTA filed a motion for summary judgment, arguing that Petitioners had no evidence in support of their main contention that the system-wide bargaining unit was not appropriate and therefore in violation of Utah Code § 17A-2-1031. Petitioners responded on the merits, but also filed a motion pursuant to Rule 56(f) for additional time to conduct discovery. After briefing and oral argument, the district court took these motions under advisement.[1]

At 11:48 p.m. on Sunday evening, August 14, 2005, Petitioners filed a motion for leave to amend their complaint in the district court's outside drop box. Aplt. App. at

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[1] Petitioners' assertion that the district court expressed concern that its decision "might not be sustained" is incorrect. The court asked the parties to address the issue of whether the court should defer to arbitration. None of the parties sought to arbitrate, and the court did not address the issue in its decision.

169 (clerk's stamp). There was no looming litigation deadline, so filing the motion in that fashion was, at the least, highly unusual. On the very next day, August 15, the district court issued its order granting UTA's motion for summary judgment and administratively closing the case.

Instead of pursuing their motion to amend, Petitioners filed a notice of appeal on August 22, 2005, Aplt. App. at 9, one week after entry of the district court order granting summary judgment and two weeks before the due date for UTA's memorandum in opposition to the motion for leave to amend complaint. As a result, the case went up to the Tenth Circuit on appeal without any resolution of the motion to amend.

The Tenth Circuit Court of Appeals affirmed the district court orders. The court first held that Petitioners' only claim under Section 13(c) was for breach of UTA's 13(c) agreement, a state law claim that was never alleged. Pet. App. at 10a-11a (citing *Jackson Transit Authority v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 27-28 (1982)). The court then affirmed summary judgment for UTA on grounds that Petitioners failed to present evidence showing that the existing system-wide bargaining unit was not "appropriate," and therefore that UTA did not violate Section 1031 when it refused to recognize a separate bargaining unit only for TRAX operators. The Tenth Circuit opinion did not mention the free speech claim, which is not surprising given that Petitioners only devoted three sentences to this claim in their brief and

offered no legal analysis or argument demonstrating that the district court erred by dismissing the claim.[2]

The court affirmed the dismissal of Petitioners' claim against the DOL on grounds that UTA complied with Section 13(c) and that the DOL acted properly in certifying UTA's protective arrangements in 2001 and 2006. Finally, the court affirmed the dismissal without prejudice of the state law claim of breach of fiduciary duty against Local 382.

REASONS FOR DENYING THE PETITION

The issues presented in this case deal mainly with Utah law, not federal law, and have created no split of authority among the federal circuit courts. The claims were dismissed for the simple reason that Petitioners failed to present admissible evidence in support of those claims in response to UTA's motion for summary judgment. Finally, the lower courts decided the legal issues correctly. Accordingly, there is no compelling reason to grant the Petition.

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[2] The only discussion by Petitioners of their free speech claim in their briefs to the Tenth Circuit was the following three sentences on page 25 of their Opening Brief in case no. 05-4222:

> Additionally, the affidavits against Katherine Pett, UTA General Counsel supported a free speech claim against UTA. Aplt. App. A at 38, 39 and Aplt. App. A at 75-77. These actions also support plaintiffs' 1983 claims since it is the constitutional violations that primarily support the 1983 cause of action. The plaintiffs clearly distinguished precedent cited by the trial court used to ignore the evidence [sic].

I. PETITIONERS' ARGUMENT REGARDING THE APPROPRIATENESS OF THE BARGAINING UNIT WAS NOT PROPERLY PRESENTED TO THE LOWER COURTS, DOES NOT PRESENT A QUESTION OF FEDERAL LAW, AND WAS CORRECTLY DECIDED.

Petitioners argue that the Court should grant the Petition because the lower courts did not explicitly consider a list of 12 factors in evaluating the appropriateness of the collective bargaining unit in this case, and instead determined that the unit was appropriate based on consideration of only a few factors. According to Petitioners, this creates a circuit split because the 12-factor test is required by federal law, and the lower courts improperly applied Utah law, not federal labor law, in holding that the existing system-wide bargaining unit at UTA was appropriate, and in approving a bargaining unit that was *negotiated* between UTA and Local 382. Petitioners argue that these lower court rulings conflict with decisions of the District of Columbia Circuit and the Third Circuit Courts of Appeals. Petitioners' arguments lack merit for several reasons.

First, Petitioners never properly raised to the lower courts the specific 12-factor test on which they base their argument because they failed to present evidence on those factors in response to UTA's motion for summary judgment. Second, the lower court decisions approving the existing bargaining unit were in fact based on federal labor policy, whether or not those courts explicitly applied the 12-factor "test" Petitioners have cited. Third, it is well-settled that the scope of a bargaining unit may be negotiated between the parties to a labor contract, as long as the unit is appropriate. Accordingly, there is no circuit

split at all, and no reason, much less a compelling reason, to grant the petition.

A. The Tenth Circuit Decision Creates No Circuit Split.

Section 13(c) of the UMTA provides that as a condition of financial assistance from the federal government, the interests of public transit employees affected by the financial assistance "shall be protected under arrangements the Secretary of Labor concludes are fair and equitable." 49 U.S.C. § 5333(b). Such arrangements are to include the "continuation of collective bargaining rights." *Id.* In this case, the Department of Labor certified that the arrangements provided by UTA for the protection of its employees, including the protection of its employees' collective bargaining rights pursuant to Section 13(c), are fair and equitable. Aplee. Supp. App. at 267-70.

Applicable case law makes clear that the term "collective bargaining rights," as used in Section 13(c), incorporates the general substance of federal labor *policy*, but not federal labor law itself. This point was explained in *Amalgamated Transit Union International v. Donovan*, 767 F.2d 939 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986), the leading case on Section 13(c) labor standards and the case on which Petitioners rely:

> [Section 13(c)] provides that state law should govern the labor relations of public transit authorities and their employees, but it conditions federal transit aid, in part, on the continuation of collective bargaining rights. In setting out those rights, Congress chose not to incorporate the entire structure and requirements of the NLRA into section 13(c), for to do so would force states to choose between federal transit aid and their

> exclusion from the coverage of the NLRA. On the other hand, Congress made it clear that federal labor policy would dictate the substantive meaning of collective bargaining for purposes of section 13(c). "Good faith" bargaining, to a point of impasse if necessary, over wages, hours and other terms and conditions of employment has always been the essence of federally-defined collective bargaining rights; indeed, excluding the federal sector, it is the almost universally recognized definition of collective bargaining in the United States.

767 F.2d at 950-51.

Donovan's description of the substantive content of federal labor policy makes clear that federal labor *policy* does not include all of the procedural and other details of federal labor *law*. States can provide for the "continuation of collective bargaining rights," and thus comply with Section 13(c), without providing all of the National Labor Relations Board's rules and procedures. This principle plainly extends to the determination of an appropriate bargaining unit. Although it is fair to assume that the *Donovan* reference to the right to be "represented" in "meaningful negotiations" encompasses within it a right to be in an *appropriate bargaining unit*, the particular method of determining an appropriate bargaining unit cannot fairly be described as "substantive." Federal labor policy dictates that the bargaining unit be "appropriate," but not that its precise scope or appropriateness be determined according to any particular procedure.

The Tenth Circuit decision did not conflict with *Donovan* in any way. Indeed, the Tenth Circuit explicitly acknowledged that the Utah statute at issue must be

interpreted consistently with UMTA. Pet. App. at 12a ("Because this provision was enacted to ensure federal funding under UMTA, we read appropriate to mean any unit sufficient to comply with UMTA."). The Tenth Circuit then applied federal labor policy to determine whether the existing bargaining unit was appropriate. Specifically, the Tenth Circuit determined that the existing system-wide unit was appropriate based on bargaining history, existing practice throughout the country, prior decisions of the National Labor Relations Board dealing with transit employees, and the lack of any indication that the existing bargaining unit had impaired bargaining rights. Pet. App. at 13a-14a (citing federal cases).

The Tenth Circuit also analyzed Petitioners' arguments regarding the federal labor doctrines of accretion and severance, and ultimately concluded that severance, not accretion, was the more applicable analytical tool, contrary to Petitioners' argument. The court held, as did the district court, that Petitioners had failed to establish a basis for severing TRAX operators from the existing bargaining unit. Pet. App. at 14a-19a (citing federal cases). Petitioners disagree with this conclusion but have not demonstrated how it creates a circuit split.

B. Petitioners Never Properly Presented The 12-Factor Test They Claim The Lower Courts Were Required To Consider.

Petitioners argue that the Tenth Circuit should have explicitly applied a 12-factor test applied by the Fourth Circuit in *Baltimore Sun Company v. N.L.R.B.*, 257 F.3d 419, 429 (4th Cir. 2001). But those factors were never properly raised by Petitioners before the Tenth Circuit or the district court. This matter was addressed by the

district court in the context of a motion for summary judgment, which requires that the non-moving party, on issues where it has the burden of proof, come forward with admissible evidence of its position in order to raise a genuine dispute of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

Although Petitioners cited the 12-factor test to the lower courts and argued that the determination of an appropriate bargaining unit was inherently factual, they failed to present evidence relevant to any of those factors. Because Petitioners, as plaintiffs asserting the violation of Section 1031 (which requires UTA to recognize and bargain with the representative of a majority of employees in an "appropriate" bargaining unit), had the burden of proving that the existing unit was not appropriate, their failure to present evidence on that point made it unnecessary to consider each of the 12 factors Petitioners now claim must be applied every time a court or the National Labor Relations Board determines the appropriateness of a bargaining unit. In fact, Petitioners' failure to present evidence made it impossible to analyze those factors. Accordingly, the Tenth Circuit did not fail to apply federal labor policy or reject any federal test for evaluating the appropriateness of a bargaining unit. There is no conflict between the Tenth Circuit's decision in this case and the D.C. Circuit's decision in *Donovan*.

C. The Tenth Circuit Decision Affirmed The District Court's Decision And Also Correctly Determined That The Bargaining Unit Is Appropriate.

Moreover, the Tenth Circuit was correct in affirming the district court, notwithstanding Petitioners' argument

that the district court used a "new legal standard" in granting summary judgment. Petitioners complain that "without notice to Petitioners, the district court created a legal standard without a legal basis in federal or state law. The district court took this action after the non-moving party had filed its opposition to summary judgment and requested discovery under the only identified standard." Pet. at 15. This completely distorts the action of the district court.

1. Petitioners received proper notice of the factors the lower courts relied on to decide the appropriateness of the bargaining unit.

In the first place, the district court merely resolved arguments that were made by the parties. The facts relied on by the district court were alleged by UTA and supported with admissible evidence, and the arguments based on those facts were made by UTA in the legal briefs UTA submitted to the district court and served on Petitioners. Petitioners were therefore given ample notice, as provided for in the Federal Rules of Civil Procedure, and had every opportunity to respond pursuant to those rules.

Indeed, Petitioners did respond. However, instead of claiming that the district court was unfairly considering a legal standard of its own creation, as they argue to this Court, Petitioners argued that TRAX employees had been improperly "accreted" into the system-wide bargaining unit. The district court and the Tenth Circuit concluded that accretion did not apply, but did not claim it was a federal doctrine that could never apply. Instead, the lower courts concluded that severance, another federal labor doctrine dealing with the appropriateness of bargaining

units, was applicable, and applied that doctrine in dismissing Petitioners' claim that UTA violated Utah labor law.

2. The Tenth Circuit decision does not conflict with the Third Circuit decision in *Paper Manufacturers*.

Petitioners also claim that the Tenth Circuit's decision is in conflict with the purported holding of *N.L.R.B. v. Paper Manufacturers Company*, 786 F.2d 163, 167 (3rd Cir. 1986) that "[r]epresentation issues may not be decided by contract, and thus may not be decided by an arbitrator." Petitioners claim the Tenth Circuit decision is in conflict with the Third Circuit decision in *Paper Manufacturers* because it approved the bargaining unit agreed upon by UTA and Local 382 in the 2003 Labor Contract. Pet. at 11-12.

This argument fails for several reasons. First, the Tenth Circuit independently determined that the existing bargaining unit was appropriate under Section 1031, which it interpreted based on federal labor policy. It did not decide the unit was appropriate simply because it was agreed between the parties. Second, *Paper Manufacturers* does not hold that parties to a collective bargaining agreement may not negotiate and come to agreement on the scope of the bargaining unit; it merely holds that the Board need not defer to the decision of an arbitrator interpreting such an agreement. *Paper Manufacturers*, 786 F.2d at 167. Indeed, in *Paper Manufacturers*, a rival union had already sought a ruling from the Board at the time of an arbitration on the same issue. There was no such rival union, arbitration, or Board proceeding in this case. Third, this Court has already held that representation issues can be arbitrated. *Carey v. Westinghouse*

Electric Corp., 375 U.S. 261, 272 (1964) (representation issues can be arbitrated; "Should the Board disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would, of course, take precedence"). There is no need for further consideration of the same issue. Most importantly, it is undisputed that the Board had no jurisdiction in this case because UTA is a political subdivision of the state of Utah and therefore could not have decided on the applicable bargaining unit. Accordingly, *Paper Manufacturers* is irrelevant.

In any event, contrary to Petitioners' argument, it is well-settled that parties to a collective bargaining agreement may negotiate over the scope of the bargaining unit, and that such agreements will be upheld by the Board so long as the agreed upon unit is appropriate. As stated in a respected labor law treatise, the scope of the bargaining unit is a permissive subject of bargaining:

> Whenever bargaining takes place without a prior Board definition of the unit, the parties must agree upon the unit to be covered by the contract they negotiate. . . . Even when the Board has defined a unit, the parties are free to agree on a negotiated unit different from the certified or recognized unit. . . . The Board accepts as lawful the bargaining units that the parties establish by consensual agreement.

1 Patrick Hardin & John E. Higgins, Jr., The Developing Labor Law, 1257-58 (4th ed. 2001). *See, e.g.*, *Kroger Co.*, 219 N.L.R.B. 388, 389 (1975) (approving collective bargaining agreement that included employees at employer's future locations in the bargaining unit). Furthermore, where there is no administrative agency with jurisdiction

to decide labor questions such as the determination of an appropriate bargaining unit, the parties typically determine the scope of the bargaining unit by agreement. Lee C. Shaw & R. Theodore Clark, Jr., *Determination of Appropriate Bargaining Units in the Public Sector: Legal and Practical Problems*, 51 Or. L. Rev. 151, 152-53 (1971-72) ("In states which do not have applicable legislation, the determination of the appropriate bargaining unit is made by the parties."). For these reasons, the Tenth Circuit opinion does not conflict with any other circuit on the issue of the parties' ability to establish the scope of a collective bargaining unit in contract negotiations.

3. Petitioners have an adequate remedy under state law.

Finally, Petitioners incorrectly argue that the Tenth Circuit decision effectively deprives them of any mechanism under Utah law for challenging the appropriateness of the bargaining unit, in violation of Section 13(c). However, Section 1031 specifically requires UTA to recognize and bargain exclusively with the majority representative of its employees in an "appropriate" bargaining unit. Utah Code Ann. § 17A-2-1031. If the existing bargaining unit is not appropriate, UTA would be in violation of the statutory requirement, and would be subject to suit in state court. *Cf. Jackson Transit Authority v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 27-28 (1982) (Section 13(c) requires, as condition of federal funding, that state labor laws provide for a continuation of collective bargaining rights; violations are cognizable as breach of contract actions in state court).

II. THE COURT SHOULD NOT CONSIDER PETITIONERS' THIRD QUESTION PRESENTED REGARDING THEIR FREE SPEECH CLAIM.

A. Petitioners' Argument That The District Court Misapplied The Law In Dismissing Their Free Speech Claim Was Waived Because It Was Not Made To The Court Of Appeals.

The Court should not consider Petitioners' argument that the district court misapplied the law in dismissing their free speech claim because this argument was never raised in the Tenth Circuit. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (question not raised in the court of appeals was not properly before the Supreme Court). Further, because Petitioners failed to raise this issue in their opening brief before the court of appeals, the issue is waived. *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 984, n.7 (10th Cir. 1994).

1. Petitioners Did Not Raise the Argument that the District Court's Application of *Perry* was Wrong.

Petitioners did not cite, discuss, analyze or even mention the case of *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), or *Texas State Teachers Ass'n v. Garland Ind. School District*, 777 F.2d 1046 (5th Cir. 1985), in their appeal to the Tenth Cir[illegible], or otherwise try to argue or show in any way that the district court's application of *Perry* was in error or inconsistent with *Garland* or the law of any other circuit. Therefore, the Defendants had no opportunity to address any such argument, and the Tenth Circuit was not given the opportunity to consider or decide the issue. The issue is waived,

and the Court should not allow Petitioners to now make this argument for the first time on appeal to this Court.

2. Petitioners Did Not Raise the Argument that the District Court Improperly Found that Their Speech was Not on a Matter of Public Concern.

Petitioners' argument to this Court that their speech concerning "union organizing efforts" was of public concern and therefore entitled to First Amendment protection under the authority of *Connick v. Meyers*, 461 U.S. 138 (1983) was likewise never made to the court of appeals and was therefore waived. Petitioners never raised this issue on appeal nor did they assert that the district court erred by holding that the Petitioners' speech was not on a matter of public concern. Indeed, they could not do so, because as they acknowledged in their petition to this Court, the district court never so held, and in fact did not discuss the issue at all and did not rely upon any such holding as a basis for granting UTA's motion for summary judgment. *See* Pet. App., pp. 33a-34a.

B. There Is No Split Of Authority Between The Circuits For The Court To Resolve Because The Tenth Circuit's Opinion In This Case Is Not Contrary To The Fifth Circuit's *Garland* Decision Or The Decision Of Any Other Court.

The Tenth Circuit's opinion says nothing about *Perry*, *Garland* or whether the district court properly applied the law in dismissing Petitioners' free speech claim. This is not surprising because Petitioners never raised or discussed this issue on appeal and never cited, discussed or analyzed

Perry or *Garland*. The Tenth Circuit's opinion in this case in no way contradicts *Garland*, or any other circuit court opinion on this issue because it never considered or decided this issue. Therefore, there is no split of authority between the circuits for this Court to resolve.

C. In Any Event, The District Court Did Not Misapply The Law.

Petitioners' free speech claim is based upon UTA's initial denial of their request to post information on an internal non-public bulletin board concerning their desire to organize a rival to their exclusive bargaining agent, Local 382 of the Amalgamated Transit Union. There is no dispute that this desire was motivated by their belief that Local 382 did not do enough in contract negotiations to ensure that they got higher pay and better shifts than transferred bus operators with more company-wide seniority. UTA allowed Petitioners to post the information they desired on the bulletin board shortly after the complaint was filed, but has always maintained that Petitioners had no constitutional right to do so.

As pointed out in UTA's motion for summary judgment, there is no dispute that the internal bulletin board in UTA's workplace to which Petitioners demanded access was a non-public forum. As such, UTA had the right to impose reasonable restrictions on its use to protect its legitimate interests. *Perry*, 480 U.S. at 51-52. One such interest is "to prevent the [workplace] from becoming a battlefield for inter-union squabbles" and "in ensuring labor peace in the workplace." *Perry*, 460 U.S. at 52. A reasonable restriction for protecting that interest is to

provide access to a recognized exclusive bargaining representative to use internal communication methods to communicate with employees, and exclude rivals to the union from using these methods. *Id.*

Petitioners attempted to distinguish *Perry* in the district court simply by asserting that it should not apply because a "rival union" was excluded from access in that case, not a group of dissident employees seeking to organize a rival union. The district court properly determined that this was not a meaningful distinction, because the *Perry* holding was not based upon the form of the group seeking access, but upon the public employer's legitimate interest in "ensuring labor peace in its workplace" and preventing the workplace "from becoming a battlefield for inter-union squabbles."

Contrary to Petitioners' assertions, the *Perry* holding was not improperly "expanded" by the district court and was not applied by the district court in a manner contrary to the holding in *Texas State Teachers Ass'n v. Garland Ind. School District*, 777 F.2d 1046 (5th Cir. 1985). The *Garland* court declared unconstitutional a school policy which totally prohibited its teachers from communicating with one another concerning any employee organization, including a total prohibition against dissemination of any information concerning employee organizations on bulletin boards which were set aside for the teachers' personal use. This was not the issue in this case or in *Perry*. Instead, as here, *Perry* involved a request by a group which was a rival to the employees' exclusive bargaining agent to have access equal to the bargaining agent's access to a non-public forum. Further, the *Garland* court noted that unlike the school district in that case, the school district in *Perry*

did not prohibit the teachers' access to internal communication methods to speak on teacher issues, because it expressly granted that access to the teachers' recognized bargaining representative. *Garland*, 777 F.2d at 1052, n.6.

Furthermore, the test for determining the constitutionality of restrictions on the speech of public school teachers is not applicable to other public employees in other settings. The *Garland* court applied the so-called *Tinker* test, derived from the case of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which held that student and teacher communications in a public school may be suppressed only when "the expression or method of exercise materially and substantially interferes with the activities or discipline of the school." *Garland* at 1053. However, this test has been rejected by the courts in other public employer settings because the rationale for imposing such a stringent standard is unique to the public school setting. Instead the public concern balancing test enunciated in the *Connick* case is the appropriate test to apply in public employee cases not involving the speech of teachers in schools. *See, e.g.*, *King v. Downing*, 58 Fed. Appx. 830 (10th Cir. 2003).

Under the public concern balancing test, the court balances the interest of the public employee in speaking in the workplace on "matters of public concern" against the public employer's interest in regulating the speech of its employees so it can carry on an efficient and effective workplace. *Moore v. City of Wynnewood*, 57 F.3d 924, 931 (10th Cir. 1995). The *Perry* case establishes that a government employer may, without violating free speech rights, give a recognized exclusive bargaining representative access to its internal non-public communication methods and exclude rival groups from accessing these

methods, because of the strong legitimate interest of the government employer in "ensuring labor peace within the workplace" and preventing the workplace "from becoming a battlefield for inter-union squabbles." This interest outweighs Petitioners' interest in having equal access to non-public inter-company bulletin boards, even if their attempt to organize a rival union for the purpose of preserving their personal interest in choosing favorable work shifts were considered to be a matter of public concern.

CONCLUSION

Petitioners have not established any compelling reason for this Court to grant the Petition. Therefore, UTA respectfully requests that the Petition be denied.

Respectfully submitted,

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(4)

No. 06-1050

In the Supreme Court of the United States

LISA BURKE, MICHAEL CARPER, Individually and on Behalf of All Others Similarly Situated,
Petitioners,

v.

UTAH TRANSIT AUTHORITY, JOHN INGLISH, Individually, LOCAL 382 OF THE AMALGAMATED TRANSIT UNION and the UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

Page(s)

Table of Authorities ii

I. RESPONDENTS IGNORE THE FUNDAMENTAL UNFAIRNESS OF CREATING A NEW LEGAL STANDARD FOR SUMMARY JUDGMENT AFTER PETITIONERS HAD FILED THEIR SUMMARY JUDGMENT RESPONSE 1

II. RESPONDENTS COMPLETELY IGNORE THAT PETITIONERS MADE A TIMELY RULE 56(F) MOTION THAT SHOULD HAVE PRECLUDED SUMMARY JUDGMENT 6

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases

Addington v. Farmer's Elevator Mutual Co.,
650 F.2d 663 (5th Cir. 1981) 7

Agostino v. Ellamar Packing Co.,
191 F.2d 576 (9th Cir. 1951) 7

Baltimore Sun v. National Labor Relations Board,
257 F.3d 419 (4th Cir. 2001) 2, 3

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 2

Chas S. Winner, Inc. v. Teamsters Local Union No. 115,
777 F.2d 861 (3rd Cir. 1985) 5

City of Timberlake v. Cheyenne River Sioux Tribe,
10 F.3d 554 (8th Cir. 1993) *cert denied*,
512 U.S. 1236 (1994) 8

Cohen v. Curtis Publishing Co.,
333 F.2d 974 (8th Cir.) *cert. denied*
380 U.S. 921 (1965) 7

Conley v. Gibson, 355 U.S. 41 (1957) 9, 10

Foman v. Davis, 371 U.S. 178 (1962) 8, 9, 10

Intern. Ass'n of Machinists v. N.L.R.B.,
759 F.2d 1477 (9th Cir. 1985) 4

International Brotherhood of Electric Workers v. Aubrey, Jr.,
42 Ca. App. 4th 861
(Ct. App. 2nd Appellate Dist., Div. 4 1996) 3

Mosier v. Federal Reserve Bank of New York,
132 F.2d 710 (2nd Cir. 1942) 7

NLRB v. Magnavox Co., 415 U.S. 322 (1974) 8

NLRB v. Paper Manufacturers,
786 F.2d 1163 (3rd Cir. 1986) 5

N.L.R.B. v. Stevens Ford, Inc.,
773 F.2d 468 (2d Cir. 1985) 4, 5

Rules

Fed. R. Civ. P. 56(f) 6

Statutes

49 U.S.C. § 5333 (b) [Section 13 (c) (2) (B) of the Urban Mass Transportation Act] 9

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioners Burke and Carper respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

I. RESPONDENTS IGNORE THE FUNDAMENTAL UNFAIRNESS OF CREATING A NEW LEGAL STANDARD FOR SUMMARY JUDGMENT AFTER PETITIONERS HAD FILED THEIR SUMMARY JUDGMENT RESPONSE.

Respondent UTA seeks to avoid addressing the unfairness of altering the standard for determining whether a question of material fact exists for summary judgment by falsely asserting that: "Petitioners never properly raised to the lower courts the specific 12-factor test." (UTA Resp. at p.11.) Of course, before the United States Supreme Court has the record before it such claims are difficult to refute. However, the Court has before it the En Banc petition. (Pet. App. 54a-68a.) Within the En Banc petition, the twelve factor test, (also called the "community of interest test") is clearly identified. *(Id.* at 62a.) The En Banc petition also states that: "The test and the Appellants' response to summary judgment, briefly demonstrating the suitability of the TRAX only bargaining unit was provided to the Panel as an exhibit." (*Id.* at 62a-63a.) The record will demonstrate that the twelve factor test was clearly presented to the district and Tenth Circuit courts both in written filings and oral argument.

The En Banc petition also demonstrated the factors which precluded summary judgment. (*Id.* at 63a-64a.) These factors were identified before the district court and affidavits supporting them were provided both to the district and Tenth

Circuit courts. If the Court grants Certiorari and reviews the record it will see that the issue was clearly raised below and evidence was provided to the district court despite the district court denying the petitioners all discovery. Moreover, since the Tenth Circuit Court heard a combined appeal from both a denial of an injunction (05-4079) and the granting of summary judgment (05-4222) the Court should request the entire record.

The movant for summary judgment, respondent UTA, had the burden to demonstrate that no genuine issue of material fact existed prior to the non-movant having to offer evidence demonstrating the existence of these disputes. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). Of course, before it can be shown that no dispute about material facts exists one must identify the substantive standard that creates material facts. The respondents never identified a standard contrary to the twelve factor test. Thus, in their response to summary judgment in the district court the petitioners spent most of their efforts identifying the failure of the respondents to address the twelve factor test and directing the district court's attention to *Baltimore Sun Co. v. National Labor Relations Board*, and its clear explanation of the twelve factor test. 257 F.3d 419, 429 (4th Cir. 2001). Additionally, the lower courts had five affidavits from petitioners which spoke directly to factors within the twelve factor test. They particularly addressed geographical proximity, existence of or lack of common supervision, qualifications, skills and training and desires of the workers. All these factors favored a finding of a separate bargaining unit and were addressed in the affidavits and/or a petition with 63% of the TRAX employees requesting that they not be included in the same bargaining unit as the bus employees. At the oral argument on the summary judgment motion before the district court the twelve factor test was also raised. The following statement was the

most concise: "And we think that there has to be factual findings on all 12 of the factors and then there has to be a weighing of the twelve factors and weighing individual factors against each other." At the same oral argument, petitioners also stated that: "And we think this court is basically taking away our Seventh Amendment rights to a jury by making this determination without having a jury go through the 12 factor test and make factual determinations on each of the 12 factors." The petitioners stated in a filing before the Tenth Circuit panel:

> The NLRB has created a test for determining bargaining units that is the 'community of interest' test. *Baltimore Sun v. National Labor Relations Board*, 257 F.3d 419, 429 (4th Cir. 2001). In order to show that there was no dispute on a material fact, i.e., that the TRAX employees were within an appropriate bargaining unit, defendant UTA had to show that all the factors used in that test pointed in their direction. UTA had to show, by presenting evidence or by pointing to a lack of evidence by the plaintiffs after an adequate time for discovery, that no dispute existed.
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> Of course, UTA could not satisfy this requirement since the plaintiffs had already presented evidence on two important factors in the community of interest test, i.e., that the TRAX employees had separate supervisors and separate facilities. *International Brotherhood of Electric Workers v. Aubrey, Jr.*, 42 Ca. App. 4th 861 (Ct. App. 2nd Appellate Dist., Div. 4 1996). These two factors alone in plaintiffs favor precluded the granting of summary judgment in this case since UTA's defense to all the claims was that it had negotiated with the appropriate bargaining unit. A reasonable jury could find for the plaintiffs on the

> issue just based on the two factors being in the plaintiffs' favor.

These passages concentrated on just two of the factors since these factors were critical in the *Aubrey* case. The accretion factors were not used by that court with the "community of interest test" due to the existence of common supervision and a common facility. *Id. at 871.* In the case at bar, the affidavits established the existence of separate supervision and a separate facility. While the respondents treat petitioners' arguments concerning accretion and the twelve factor test as if they are opposing arguments, in fact, they are to be considered together to decide upon the appropriate substantive standard to determine an appropriate bargaining unit. As stated by the court in *Aubrey:*

> Under the so-called accretion doctrine, groups of new employees can be added to an existing bargaining unit without holding a vote on their representation. (*N.L.R.B. v. Stevens Ford, Inc.* (2d Cir. 1985) 773 F.2d 468, 472.) The criteria used to determine whether this should be done include the usual factors considered in making appropriate-unit determinations. (Id. at p. 473; *Intern. Ass'n of Machinists v. N.L.R.B.* (9th Cir. 1985) 759 F.2d 1477, 1479.) Because no election will be held if an accretion is found, however, additional factors must first be considered: whether the new group of employees itself constitutes an appropriate unit; the size of the group to be accreted relative to the size of the existing unit; whether the group to be accreted was already in existence at the time the existing bargaining unit was recognized; the extent to which the existing unit is itself the result of

> prior accretions; and, of course, the views of the employees. (*Stevens Ford, supra*, at pp. 473-475.)

Id. at 872.

Respondent UTA also seeks to defend the lower courts' actions by citing to two sections of treatises that clearly do not apply. (Resp. at p. 18-19.) The first section involves the creation of an initial bargaining unit. (*Id.* at 18.) This case does not involve the creation of an initial bargaining unit. The bus employee bargaining unit has been in existence for decades, even by the admission of respondent UTA. (UTA Resp. at p. 3.) The NLRB grants companies and unions great deference in creating initial bargaining units. That is because no matter what is decided the workers will be given an opportunity to vote on the bargaining representative. Also, it does not upset an existing bargaining unit because the unit is just being created. This case involves the attempted addition or accretion of light-rail employees into the existing bus employee bargaining unit. In the accretion context, an attempt to impose a bargaining unit or force an accretion of employees into an existing bargaining unit is prohibited. *NLRB v. Paper Manufacturers*, 786 F.2d 1163 (3rd Cir. 1986) (Citing *Chas S. Winner, Inc. v. Teamsters Local Union No. 115*, 777 F.2d 861 (3rd Cir. 1985.))

The second treatise is also not applicable. The treatise section does not examine the impact that UMTA has on limiting the ability of a state to choose a bargaining unit. Respondent UTA continues to evade its responsibility to protect the basic rights that the employees previously had under the NLRA. This is a requirement to be eligible for federal funds.

II. RESPONDENTS COMPLETELY IGNORE THAT PETITIONERS MADE A TIMELY RULE 56(F) MOTION THAT SHOULD HAVE PRECLUDED SUMMARY JUDGMENT.

Respondents UTA and Local 382 also ignore that petitioners made a timely Rule 56(f) motion asking for discovery to better respond to the motion for summary judgment. One of the issues that petitioners requested discovery on was on the issue of whether Local 382 has majority support in either the bargaining unit Local 382 and UTA claim is appropriate or in the distinct TRAX division of UTA which the petitioners claim is the appropriate bargaining unit. The petitioners, by presenting a petition and affidavits supporting it to the district court and then the Tenth Circuit, with 63% of the TRAX employees objecting to Local 382, certainly placed that issue in question. Despite the Tenth Circuit recognizing that Utah Code Ann. § 17A-2-1031 requires that UTA bargain with a group representing a majority of the employees and the district court similarly recognizing that requirement, the lower courts did not find the petitioners' request for discovery on that issue to be important. (Pet. App. at 11a-12a; 29a-30a.) However, since the TRAX employees are the only ones that have majority support for their putative union, the continued refusal by UTA to bargain with a chosen representative of the TRAX employees is a clear violation of the statute. The refusal of the lower courts to grant discovery is just another example of the basic unfairness towards the Petitioners.[1]

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[1] A further example of the lower courts treating the petitioners unjustly is the lower courts' treatment of a motion to amend that was timely filed prior to the issuance of the summary judgment decision. Respondent UTA is correct that "the case went up to the

Tenth Circuit on appeal without any resolution of the motion to amend." (UTA Resp. at p. 9.) The petitioners have similarly identified this deficiency. (App. Pet. at p. 6.) The Tenth Circuit Court's ruling suggests that the petitioners forfeited their ability to have their motion to amend heard by cutting off the district court's ability to rule by filing a premature appeal. (App. Pet. at 22a-23a.) Respondent UTA also seems to suggest that petitioners acted inappropriately. (UTA Resp. at 8-9.) However, this assertion is clearly contrary to established law. It is well established law that: "The denial of a motion by the district court, although not formally expressed, may be implied by the entry of final judgment (which is in effect an overruling of pending pretrial motions) or of an order inconsistent with the granting of the relief sought by the motion." *Addington v. Farmer's Elevator Mutual Co.*, 650 F.2d 663, 666 (5th. Cir. 1981) (citing *Agostino v. Ellamar Packing Co., 191 F.2d 576, 577 (9th Cir. 1951); Mosier v. Federal Reserve Bank of New York,* 132 F.2d 710, 712 (2nd Cir. 1942): see also *Cohen v. Curtis Publishing Co.*, 333 F.2d 974, 977 (8th Cir.), *cert. denied* 380 U.S. 921(1965)). The district court had a history of not ruling on petitioners' motions and they did not want to delay their ability to exercise their First Amendment rights. The petitioners did wait seven days to give the district court a reasonable opportunity to reverse its decision to close but believed that any attempt to persuade that court to re-open the case was an exercise in futility. In fact, if they had not filed within the thirty-day deadline they would have lost their ability to appeal. Thus, the petitioners acted reasonably with the belief that they needed to act quickly to get a review of their case and to prevent respondent UTA from placing even more impediments on the exercise of their First Amendment rights. For example, after the hearing at the Tenth Circuit Court, but before the decision was even entered, respondent UTA increased the restrictions on free speech and free association at the job site by threatening to fire anyone who even mentioned forming a new association to challenge the entrenched union. Thus, it is was unfair for the Tenth Circuit Court to hold that the petitioners lose their right to amend because an appeal was filed after a final

Thus, the Court should, at a minimum, reverse the granting of the summary judgment and remand this case to the district court to identify the substantive standard to be used for summary judgment and allow the petitioners to respond to a motion for summary judgment after the standard is established. However, the petitioners humbly request more of the Court. Despite the Court's ability to reverse the case based solely on the respondents' failure to demonstrate that their were no material facts in dispute due to the failure to identify a substantive standard, the petitioners implore the Court to consider all of the issues of law concerning summary judgment for the sake of judicial economy which is consistent with Tenth Circuit case law. *City of Timberlake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 559 (8th Cir. 1993) *cert denied*, 512 U.S. 1236 (1994). The petitioners, blue collar workers, lack the resources to engage in a war of attrition with the well funded respondents and request that the Court

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judgment was entered. The Tenth Circuit Court should have treated the closure of the case as a denial of the motion to amend. This is particularly true in a case where the district court had a history of silently denying motions. Consequently, it should have remanded the case back to the district court for a decision on the amended complaint. A complete failure to justify a denial of a motion to amend is an abuse of discretion. *Foman v. Davis*, 371 U.S. 178, 182 (1962). As stated by the Court in *Foman*:

> The grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rule.

Id.

decide the other critical legal issues in the case as well. As recognized by then Justice Rehnquist in *NLRB v. Magnavox Co.*, blue collar workers can become pawns between bureaucratic self-serving unions and management. 415 U.S. 322, 325 (1974) (J. Rehnquist concurring in part & dissenting in part.) Justice Rehnquist's opinion understood that blue collar workers typically lack the resources to litigate the protection of their rights. This is certainly true in the case at bar. The Urban Mass Transportation Act's guarantee of continuing bargaining rights for workers becomes meaningless if the Court affirms a decision that a company and an entrenched union can select the bargaining representative for employees assigned to new positions. *See* § 13(c)(2)(B), 49 U.S.C. § 5333 (b).

While the petitioners have largely been represented by one counsel, pro bono, at one time the combined number of attorneys representing the DOL, Local 382 and UTA was approximately twenty. Counsel for petitioners does not assert that his presentation to the lower courts was perfect. However, the lower courts were always presented with enough information to satisfy the requirements of Federal Rules of Civil Procedure that the merits be presented. The petitioners should have been given an opportunity to develop their case through discovery so the merits of their position would determine the outcome. As stated by the United States Supreme Court in *Foman v. Davis*, 371 U.S. 178, 181-82 (1962):

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome

and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' *Id.* (Citing *Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

CONCLUSION

The Court should grant a writ of certiorari to the petitioners. The petitioners have been deprived of due process by the lower courts. The Court should reiterate that lower courts should not misuse the summary judgment process to find ways to dismiss meritorious claims. The Court should also examine an important federal labor law statute to give uniform guidance to courts.

Respectfully Submitted,

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